

University of Dundee

## What did Ronald Coase know about the law of tort?

Campbell, David; Klaes, Matthias

*Published in:*  
Melbourne University Law Review

*Publication date:*  
2016

*Document Version*  
Publisher's PDF, also known as Version of record

[Link to publication in Discovery Research Portal](#)

*Citation for published version (APA):*  
Campbell, D., & Klaes, M. (2016). What did Ronald Coase know about the law of tort? *Melbourne University Law Review*, 39(3). <http://law.unimelb.edu.au/mulr/issues/forthcoming-issue>

### General rights

Copyright and moral rights for the publications made accessible in Discovery Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from Discovery Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain.
- You may freely distribute the URL identifying the publication in the public portal.

### Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

## WHAT DID RONALD COASE KNOW ABOUT THE LAW OF TORT?

DAVID CAMPBELL<sup>\*</sup>  
AND MATTHIAS KLAES<sup>†</sup>

*In 1996, Brian Simpson criticised the legal competence of the discussion of the nineteenth century land law case of Sturges v Bridgman in Ronald Coase's 'The Problem of Social Cost', and Coase responded to these criticisms. The discussion of Sturges v Bridgman was central to Coase's law and economics, and Simpson's aim in showing it to be unacceptable as legal scholarship was to reveal fundamental ethical and theoretical shortcomings in Coase's general approach. In revisiting this neglected debate, our aim is not so much to shed new light on the debate itself but to draw fresh insight from that debate in order to address current issues in economics and in law. Without denying Simpson's criticism of Coase's legal scholarship, we will show that the approach Simpson criticised was, indeed, one Coase himself rejected. By explaining how Coase came to treat Sturges v Bridgman in the way he did, we will seek to develop key aspects, not only of Simpson's criticism, but of Coase's response, and of the original arguments in 'The Problem of Social Cost' to which both refer. Though Coase's attempt to draw on legal materials in 'The Problem of Social Cost' was highly commendable in its intent, the roles played by Sturges v Bridgman in particular — and by the positive law of private nuisance in law and economics generally — are difficult ones which have generated a great deal of misunderstanding of Coase's theoretical argument. Paradoxically, it turns out that Coase's analysis of nuisance cases leads to there being too much 'state' and not nearly enough 'voluntary exchange' in his seminal article. We argue that this contributed to an excessive emphasis on Posnerian wealth maximisation in subsequent law and economics, and therefore to an inadequate appreciation of the possibilities of exchange in economic and legal policy.*

<sup>\*</sup> BSc (Econ) (Cardiff), LLM (Michigan), PhD (Edinburgh), FCI (Arb); Professor of Law, Lancaster University Law School.

<sup>†</sup> Dipl-Wirtsch-Ing (Darmstadt), MA (Keele), MSc, PhD (Edinburgh), FHEA; Professor of the History and Philosophy of Economics, University of Dundee. This article was presented as a paper at the First Conference of the World Interdisciplinary Network for Institutional Research (University of Greenwich, London, September 2014) and to 'The Problem of Social Cost' Revisited Workshop (Sheffield Institute of Corporate and Commercial Law, University of Sheffield, November 2014). We are grateful for comments made at those presentations, particularly those of Robert Burrell, and for comments by Rosalee Dorfman, Stephen Littlechild, John Murphy and the Editors and their anonymous referees. We are also grateful to David Ibbetson, Jonathan Morgan, Warren Swain and Keith Tribe for their help with points of archival and legal historical research.

Cite as:

David Campbell and Matthias Klaes, 'What Did Ronald Coase Know about the Law of Tort?'  
(2016) 39(3) *Melbourne University Law Review* (advance)

## CONTENTS

I	Introduction.....	2
II	Coase's Use of <i>Sturges v Bridgman</i> .....	5
III	Simpson's Criticism of Coase's Account of <i>Sturges v Bridgman</i> .....	10
IV	An Explanation of Coase's Account of <i>Sturges v Bridgman</i> .....	14
V	The Theoretical Shortcomings and the Theoretical Value of Coase's Account .....	20
	A Where Coase Went Quite Wrong .....	20
	B Where Coase Was Very Right.....	23
VI	Analysis of the Detail of Simpson's Criticism .....	30
	A The Coase Theorem is 'Purely Theoretical'.....	30
	B Solving Nuisance Cases 'Does Not Entail Attempting To Reach an Economically Efficient Solution' .....	32
	C Solving Nuisance Cases by Means of Coasean Bargaining Would Be 'Offensive' .....	35
	1 Bargaining Outcomes and Imposition of Outcomes in Law and Economics.....	35
	2 Coase and the Nature of Law and Economics.....	44
	3 Nuisance as a Bargaining Solution.....	48
VII	Conclusion .....	53

## I INTRODUCTION

It must be counted as a remarkable achievement even amongst the very many achievements which distinguished the career of the late Brian Simpson that he unarguably once came out best from a debate with the late Ronald Coase. In a 1996 article,<sup>1</sup> Simpson made some fundamental criticisms of the competence of Coase's handling of the law in 'The Problem of Social Cost',<sup>2</sup> particularly

<sup>1</sup> A W Brian Simpson, 'Coase v Pigou Reexamined' (1996) 25 *Journal of Legal Studies* 53, revised as A W Brian Simpson, 'The Story of *Sturges v Bridgman*: The Resolution of Land Use Disputes between Neighbours' in Gerald Korngold and Andrew P Morriss (eds), *Property Stories* (Foundation Press, 2004) 9. Unless another intention is expressed, hereinafter references are to the revised version. In a 2009 second edition of the Korngold and Morriss text, Simpson's paper is reproduced exactly as it was in the first edition except that, instead of running from 9–40, it runs from 11–42.

<sup>2</sup> R H Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1, reprinted as R H Coase, 'The Problem of Social Cost' in R H Coase (ed), *The Firm, the Market, and the Law* (University of Chicago Press, 1988) 95. Unless another intention is expressed, hereinafter references are to the reprinted version.

the law of nuisance in *Sturges v Bridgman*<sup>3</sup> on which Coase had focused. The response which Coase made simply failed to deal with these criticisms,<sup>4</sup> indeed it served only an occasion for Simpson to somewhat forcibly reaffirm them,<sup>5</sup> and this failure was due to the very good reason that those criticisms were perfectly accurate. Though Coase never made any pretension to ability in legal scholarship,<sup>6</sup> and did not see ‘The Problem of Social Cost’ as a contribution to such scholarship in any direct sense,<sup>7</sup> it obviously is more than a little embarrassing that the article which is one of the foundations of law and economics does not competently handle the law. The, as it were, theoretical rather than doctrinal contribution which Coase undoubtedly thought he had made ‘to the analysis of the law of nuisance’<sup>8</sup> cannot be properly made out unless it is expressed in doctrinally competent terms.

It is surprising, then, that this debate between Simpson and Coase has been largely ignored, not just in the disciplines of law and of economics as they continue to draw on ‘The Problem of Social Cost’, but in the specific field of law and economics itself. Simpson was strongly and bitterly of the opinion that the significance of his criticisms had been very insufficiently appreciated, and in the book on which he was working at the time of his death in January 2011 he wrote of his article: ‘No serious response has yet been made to the arguments there presented; devotees of law and economics pretend the piece does not exist’.<sup>9</sup>

<sup>3</sup> (1879) 11 Ch D 852. Argument and judgment in the Chancery Division of the High Court and the Court of Appeal are both reported here: 854–9 (Jessel MR), 860–6 (Thesiger LJ for the Court).

<sup>4</sup> See R H Coase, ‘Law and Economics and A W Brian Simpson’ (1996) 25 *Journal of Legal Studies* 103 (‘Reply to Simpson’).

<sup>5</sup> See A W Brian Simpson, ‘An Addendum’ (1996) 25 *Journal of Legal Studies* 99. See also below n 182.

<sup>6</sup> Coase, ‘Reply to Simpson’, above n 4, 105. In Ronald H Coase, ‘Blackmail’ (1988) 74 *Virginia Law Review* 655, 655–6, Coase made a similar disavowal of competence in the law and then proceeded to make some extremely penetrating comments on the law relating to blackmail.

<sup>7</sup> Coase, ‘Reply to Simpson’, above n 4, 104–5, quoting R H Coase, ‘Law and Economics at Chicago’ (1993) 36 *Journal of Law and Economics* 239, 250–1.

<sup>8</sup> Coase, ‘Blackmail’, above n 6, 656.

<sup>9</sup> A W Brian Simpson, *Reflections on The Concept of Law* (Oxford University Press, 2011) 136. In a review of Simpson’s magisterial history of the impact of the establishment of the European Convention on the law of public order in the decolonising British Empire, one of the current authors did comment on Simpson’s criticism of Coase and Simpson certainly was aware of this, having commented extensively on this review: David Campbell, ‘Human Rights and the Critique of the Common Law’, Book Review: *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* by A W Brian Simpson (2005) 26 *Cardozo Law Review* 791, 812–18. But overall it is fair to say that the details of Simpson’s criticism

In this article we intend to put forward such a response. It will not dispute Simpson's evaluation of Coase's handling of *Sturges v Bridgman* as legal scholarship; indeed we will say something about Coase's undergraduate legal studies that rather reinforces what, we repeat, were perfectly accurate criticisms. But our response nevertheless amounts to an affirmation of Coase's views because, whilst Coase handles the formal law badly, Simpson's handling of the theoretical issues behind the law is far worse. This was the gist of the response Coase himself made to Simpson,<sup>10</sup> but we believe that this response could and should have been developed much more systematically than Coase himself did. Simpson by no means criticised Coase's legal scholarship in order just to make a point about the quality of that scholarship. Simpson was profoundly averse to law and economics as he understood the discipline and, generously acknowledging the impact of Coase's 'celebrated article' on a 'legal world [which] has never been quite the same since',<sup>11</sup> he used his criticisms of Coase's legal scholarship as the springboard for a dismissal of Coase's views in general.<sup>12</sup> But, as is not unknown in criticisms of Coase's law and economics, Simpson showed such little understanding of Coase's approach that he essentially criticised positions the rejection of which is central to that approach.

Our overall aim, however, is not just to restate Coase's discussion of *Sturges v Bridgman* so that its basic value survives Simpson's criticisms. It is to build on this to advance the understanding of the possibilities of exchange, particularly in respect of the law of nuisance. It will emerge that the principal obstacles to more robustly restating Coase's position in legal terms are not the shortcomings of Coase's handling of the law, though we repeat that these are not denied, but the difficulties inherent in the conception of private property that lies behind *Sturges v Bridgman* and behind the law of private nuisance in general. The positive law of private nuisance is, we will argue, particularly

have attracted little attention. Even in those contributions to legal scholarship which directly address the key themes involved, the debate is relegated to the footnotes: see, eg, Daniel A Farber, 'Parody Lost/Paradigm Regained: The Ironic History of the Coase Theorem' (1997) 83 *Virginia Law Review* 397, 411–12 n 41; Ward Farnsworth, 'Do Parties to Nuisance Cases Bargain after Judgment? A Glimpse inside the Cathedral' (1999) 66 *University of Chicago Law Review* 373, 401 n 43; Ron Harris, 'The Uses of History in Law and Economics' (2003) 4 *Theoretical Inquiries in Law* 659, 680 n 42; Herbert Hovenkamp, 'The Coase Theorem and Arthur Cecil Pigou' (2009) 51 *Arizona Law Review* 633, 633 n 2.

<sup>10</sup> Coase, 'Reply to Simpson', above n 4, 105.

<sup>11</sup> Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 9, 28.

<sup>12</sup> See also *ibid* 24–9 where Simpson mounts a particular defence of Pigou against Coase's criticisms of him. We put this to one side.

unsuitable as an illustration of a real world application of Coasean bargaining since that law is not a system of what Calabresi and Melamed called property rules, but a liability rule generally qualifying property rights in the public interest,<sup>13</sup> though that interest is generally but unclearly formulated. Once this is understood, it is unsurprising that much of the discussion of ‘The Problem of Social Cost’ has been led by Coase’s manner of argument to concentrate, not on Coasean bargaining, but on alternatives to such bargaining: the firm, the government, and cases decided by courts which stipulate outcomes. For courts making decisions by stipulating outcomes are not providing a framework for the parties to reach their own decisions but are intervening just as much as a government pursuing prescriptive regulation through statute. There is, in the end, too much state and not nearly enough voluntary exchange in ‘The Problem of Social Cost’. We regard this as the chief factor contributing to the excessive emphasis on Posnerian wealth maximisation in law and economics, an emphasis which has most unfortunately predominantly been regarded as following from a commitment to ‘free markets’ when it is, indeed, its opposite.

## II COASE’S USE OF *STURGES V BRIDGMAN*

In ‘The Federal Communications Commission’, the article on broadcasting policy of which he famously intended ‘The Problem of Social Cost’ to be a generalising restatement, Coase used the 19<sup>th</sup> century land law case of *Sturges v Bridgman* to illustrate the theoretical argument which underlay the policy proposal made in the first article and which was brought to the fore in the second.<sup>14</sup> *Sturges v Bridgman* is also the first<sup>15</sup> of ‘four actual cases’ which

<sup>13</sup> Guido Calabresi and A Douglas Melamed, ‘Property Rules, Liability Rules and Inalienability: One View of the Cathedral’ (1972) 85 *Harvard Law Review* 1089, 1105–6, 1115–16.

<sup>14</sup> R H Coase, ‘The Federal Communications Commission’ (1959) 2 *Journal of Law and Economics* 1, 26–7. Coase referred to this discussion, without citation of the case, when setting up his argument in Part II of ‘The Problem of Social Cost’: Coase, ‘The Problem of Social Cost’, above n 2, 96.

<sup>15</sup> At the beginning of Part V of ‘The Problem of Social Cost’, Coase had briefly mentioned two cases as illustrations that ‘[t]he harmful effects of the activities of a business can assume a wide variety of forms’: Coase, ‘The Problem of Social Cost’ above n 2, 104. One of these is an ancient case about the obstruction of the flow of wind to a windmill which we do not think can be precisely identified but which Coase knew from its discussion in the then current edition of a standard English work on land law: Michael Bowles, *Gale on Easements* (Sweet & Maxwell, 13<sup>th</sup> ed, 1959) 237–9. This case had been discussed in *Gale on Easements* since its first edition: C J Gale and T D Whatley, *A Treatise on the Law of Easements* (S Sweet, 1<sup>st</sup> ed, 1839) 197–8. On the very poorly known facts it is very difficult to reconcile this case with the

Coase used in Part V of ‘The Problem of Social Cost’ to ‘clarify’ and ‘illustrate’ his argument in that article up to that point.<sup>16</sup> That argument had two components, each of which has proven to be enormously influential and now are so well known as to need only brief exposition here.

In Parts I and II of ‘The Problem of Social Cost’, Coase had set up the problem of the harmful incidental effects of economic action and had shown that these could be analysed as an instance of the general problem of allocating scarce resources between competing uses, and so amenable to the toolset of modern economics. As we shall show, much of the debate between Simpson and Coase turns on the shortcomings of the way Coase sought to illustrate this theoretical argument with concrete case material. It is therefore worthwhile to examine Coase’s treatment of this material in much more detail than is normal in the secondary literature on ‘The Problem of Social Cost’.

In Part II of ‘The Problem of Social Cost’, Coase had shown, as it was put in the heading of that section, ‘The Reciprocal Nature’ of problems such as pollution. To regard a side effect of an economic activity such as the factory emission of smoke in the course of industrial production, which Coase rightly says is a ‘standard example’,<sup>17</sup> as a harm can be very misleading when seeking to formulate policy toward such a side effect. Describing the side effect as a harm implies that it should be prevented. But prevention imposes the costs of preventive measures and of lost output, and complete prevention of this sort

modern law of easements of light and air, and Coase briefly notes that a modern case — *Webb v Bird* (1863) 13 CB NS 841; 143 ER 332, cited in *Gale on Easements* at 238–9; *Sturges v Bridgman* (1879) 11 Ch D 852, 855, 857 (Jessel MR), 864 (Thesiger LJ for the Court) — does not follow it: Coase, ‘The Problem of Social Cost’, above n 2, 121. The ancient authorities are in fact now only of historical interest and are described as such in the current edition of *Gale on Easements*, their discussion having been eliminated since the 14<sup>th</sup> edition of 1972: Jonathan Gaunt and Justice Paul Morgan, *Gale on Easements* (Sweet & Maxwell, 19<sup>th</sup> ed, 2012) 388 [8–02] n 6. *Webb v Bird* was itself variously commented upon, followed or distinguished in three of Coase’s four cases: *Sturges v Bridgman* (1879) 11 Ch D 852; *Bryant v Lefever* (1878–9) LR 4 CPD 172; *Bass v Gregory* (1890) 25 QBD 481. This unsatisfactory thread of argument, if this is the right description, does demonstrate shortcomings which directly follow from the deficiencies of Coase’s legal scholarship, which we discuss below in Part IV of this article. The other case concerns obstruction of the sunshine formerly benefitting the outdoor recreational areas of a hotel: *Fontainebleau Hotel Corp v Forty-Five Twenty-Five Inc*, 114 So 2d 357 (Fla Ct App, 1959). Coase no doubt cited this only because it was a timely illustration, having been decided as he was drafting his article, but, largely because of his use of it, it has become a much cited case in United States legal scholarship.

<sup>16</sup> Coase, ‘The Problem of Social Cost’, above n 2, 104–5.

<sup>17</sup> Ibid 95. The use of this example in the literature of modern welfare economics can be traced to Arthur Cecil Pigou, *The Economics of Welfare* (Transaction Publishers, first published 1920, 2002 ed) 184, and indeed to its forerunner: A C Pigou, *Wealth and Welfare* (Macmillan, 1912) 159.

of harm is inconsistent with industrial production, which would have to cease. To those who place a positive value on industrial production, prevention of such a harm cannot, then, be the aim of policy. The aim must be determining the optimal level of the activity taking the economic value of its overall effects into account, whether or not those effects are conventionally regarded as desirable or harmful. On this basis, without further consideration of the issues, it is difficult to see why the level of side effects should be determined in a different way than any other aspect of economic action, the level of which should be determined by exchange.

In Part III of 'The Problem of Social Cost', headed 'The Pricing System with Liability for Damage', Coase had shown that, assuming zero transaction costs, bargaining between the actor conventionally thought to be inflicting the harm and the actor conventionally thought to be its victim would allow us to arrive at the optimal level of the harm, for that bargaining would establish the highest valued overall allocation of resources between the parties. In this optimal allocation, the level of harm might be zero but it equally could assume any other level depending on the outcome of the negotiations. In Coase's terms, the optimal level of harm is that which maximises the overall value of production. In the absence of transaction costs, that outcome is invariant with respect to the initial allocation of liability, in quite the same way that the optimal allocation of resources in a perfectly competitive market is independent of the initial allocation of those resources.<sup>18</sup> Coase illustrates this in Part IV, headed 'The Pricing System with No Liability for Damage', where he repeats the analysis on the basis of the opposite initial position. Taken together, these Parts establish what has in various forms been called the 'Coase Theorem', a term and to a considerable extent a concept first invoked, not by Coase,<sup>19</sup> but by George Stigler,<sup>20</sup> with the result that in the period immediately after its publication 'The Problem of Social Cost' was largely interpreted through the conceptual lens of the Coase Theorem. This has had the overall malign effect that the remainder of 'The Problem of Social Cost' after Part IV still remains to be properly understood in all the various fields of scholarship in which that article has been so widely acknowledged.

In *Sturges v Bridgman*, a plaintiff doctor was granted a perpetual prohibitory injunction against a confectioner's use of machinery in neighbouring

<sup>18</sup> See generally Coase, 'The Problem of Social Cost', above n 2, 100–2.

<sup>19</sup> R H Coase, 'Notes on the Problem of Social Cost' in R H Coase, *The Firm, the Market, and the Law* (University of Chicago Press, 1988) 157; R H Coase, *Essays on Economics and Economists* (University of Chicago Press, 1994) 3, 10.

<sup>20</sup> George J Stigler, *The Theory of Price* (Macmillan, 3<sup>rd</sup> ed, 1966) 113.



premises in such a way as caused noise and vibration which unreasonably interfered with the doctor's use of his consulting room. Coase's discussions of the case in 'The Federal Communications Commission' and in Part V of 'The Problem of Social Cost' were similarly brief, in the latter article consisting of two long paragraphs occupying less than three pages.<sup>21</sup> In fact it was briefer than that, for the actual account of the case was conveyed in the shorter, first of the two paragraphs and amounted to no more than we have just conveyed, save that Coase ended the paragraph with an unattributed quotation from the judgment of the United Kingdom Court of Appeal to which we will return.<sup>22</sup>

Most of the discussion in the longer, second paragraph considered the bargaining possibilities which Coase thought were open to the parties once the Court had settled the question of liability. The doctor having been granted the injunction, the possibilities were identified by Coase in the following way:

The doctor would have been willing to waive his right and allow the machinery to continue in operation if the confectioner would have paid him a sum of money which was greater than the loss of income which he would suffer from having to move to a more costly or less convenient location, from having to curtail his activities at this location, or (and this was suggested as a possibility) from having to build a wall which would deaden the noise and vibration. The confectioner would have been willing to do this if the amount he would have had to pay the doctor was less than the fall in income he would suffer if he had to change his mode of operation at this location, abandon his operation, or move his confectionery business to some other location.<sup>23</sup>

Coase argued that, if the injunction had been refused, then '[t]he boot would have been on the other foot: the doctor would have had to pay the confectioner to induce him to stop using the machinery'.<sup>24</sup> Though the judgment would affect who has to initiate negotiations, the possibilities and the outcome would be the same.

In essence, Coase used *Sturges v Bridgman* to clarify and illustrate what have come to be known as the 'invariance' and the 'efficiency' aspects of the

<sup>21</sup> Coase, 'The Problem of Social Cost', above n 2, 105–7.

<sup>22</sup> See below Part V(B).

<sup>23</sup> Coase, 'The Problem of Social Cost', above n 2, 105–6. In relation to the suggested possibility of building a wall, Simpson rightly argues that this is not so: Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 31. The passage to which Coase presumably refers was part of the report of the confectioner's evidence at trial which was aimed at showing that the way the claimant had built his consulting room had in part caused the dispute, as, indeed, it appears was the case: *Sturges v Bridgman* (1879) 11 Ch D 852, 854.

<sup>24</sup> Coase, 'The Problem of Social Cost', above n 2, 106.

Coase Theorem. Whether the confectioner or the doctor had to start the negotiations, '[t]he solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's'.<sup>25</sup> In this account, the courts did not stipulate the outcome. The courts' statement of the initial legal position provided the framework in which the parties chose the outcome:

the immediate question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what. It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it will lead to an increase in the value of production.<sup>26</sup>

The fundamental reason why these views have attracted such attention is Coase's contention that, if left to bargaining, the 'correct' level of the harmful side effect will not depend on how rights are initially allocated. All that this initial allocation specifies is which of the parties needs to start the bargaining, if it sees scope for economic gain by engaging in market exchange which will alter the level of the effect. The result is Pareto efficient in the sense that, if all affected parties are involved in the bargaining process, the result will be one which leaves them all at least as well off as they initially were, whilst all opportunities to improve the position of any individual party will have been exhausted. This outcome can rightly and usefully be described as perfectly efficient in the way that it gives complete effect to voluntary choice.<sup>27</sup> The Coase Theorem has all the attractions of Pareto efficiency though it applies to situations previously thought categorically to be outside of the Pareto domain. What is more, the efficiency of the outcome seems to be spontaneous in the strong sense that it is invariant regardless of whether the confectioner or the doctor has to start the bargaining: 'With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources'.<sup>28</sup> The bargaining which Coase describes in his account of the case is essentially that in the now famous hypothetical example he had used in Parts III and IV of 'The Problem of Social Cost': 'The basic

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 114 (emphasis in original).

<sup>27</sup> There can be no doubt that, in expressing himself in terms of, as in the passage just quoted, 'an increase in the value of production', Coase unwittingly caused confusion in how he conceived of efficiency, and this confusion has, in a sense, been the foundation of law and economics. See below n 169 and accompanying text.

<sup>28</sup> Coase, 'The Problem of Social Cost', above n 2, 106.

conditions are exactly the same in this case as they were in the example of the cattle which destroyed crops'.<sup>29</sup> In this way *Sturges v Bridgman* was to serve, as we have seen Coase maintain, as an 'actual' case illustrative of his argument.<sup>30</sup>

In the remainder of his longer, second paragraph, Coase turned to an analysis of the thinking of the judges in *Sturges v Bridgman*: 'It was of course the view of the judges that they were affecting the working of the economic system — and in a desirable direction'.<sup>31</sup> This is an entirely different line of thought and, with respect, Coase provided the occasion for much of the subsequent confusion by failing to set this different line out in a new paragraph starting with the sentence just quoted. We shall discuss this at length below in Part VI(C)(2), but first let us consider Simpson's criticisms of Coase's account of the case as we have described it so far.

### III SIMPSON'S CRITICISM OF COASE'S ACCOUNT OF *STURGES V BRIDGMAN*

Simpson argued that Coase's account of *Sturges v Bridgman* was highly inaccurate and, as legal history, wholly unacceptable. As Simpson is right and as our concern here is not so much with legal history as with the theoretical issues of law and economics that Simpson raised, we will be very brief.

Though neither in the passage of 'The Problem of Social Cost' we have just discussed nor in 'The Federal Communications Commission' does Coase describe *Sturges v Bridgman* as a case of private nuisance, he does do so later in 'The Problem of Social Cost' and elsewhere,<sup>32</sup> and he undoubtedly saw it as such a case, being aware that nuisance is a core private law doctrine regulating interference with another's enjoyment of their land and so dealing with the problem of competing uses he sought to address. In this sense, as we have noted, Coase saw 'The Problem of Social Cost' as contributing 'to the analysis of the law of nuisance'.<sup>33</sup> But the reported case of *Sturges v Bridgman* wholly contradicts the way Coase established both 'the reciprocal nature of the problem' and what was to become the Coase Theorem.

What Coase saw as the reciprocal aspect of the case was completely dealt with in the first sentence of Jessel MR's judgment at first instance: 'I think this

<sup>29</sup> Ibid 97–104, 106.

<sup>30</sup> Ibid 105.

<sup>31</sup> Ibid 106–7.

<sup>32</sup> See Coase, 'The Problem of Social Cost', above n 2, 113 n 13; R H Coase, *Essays on Economics and Economists*, above n 19, 121 n 11.

<sup>33</sup> Coase, 'Blackmail', above n 6, 656.

is a clear case for the Plaintiff. There is really no dispute as to this being a nuisance; in fact, the evidence is all one way'.<sup>34</sup> That is all that was said there, and in the Court of Appeal nothing much was said in addition: 'It has been proved that ... a noise was caused which seriously inconvenienced the Plaintiff in the use of his consulting-room ... which ... would constitute an actionable nuisance'.<sup>35</sup> As Simpson in essence pointed out,<sup>36</sup> there is simply nothing in the ratio of the case that justified Coase's claim that *Sturges v Bridgman* is evidence of a judicial perception of the reciprocal nature of the problem.<sup>37</sup> Quite the opposite in fact. Though the language of harm is not used at all, the noise and vibration was indeed seen as a harm which should be prevented.<sup>38</sup> No sense that the doctor's use of his consulting room (and his wish to be free of noise and vibration in order to do so) was only a competing use — not in any way intrinsically superior to the confectioner's use of his machinery (and his wish to cause noise and vibration in order to do so) — forms part of the ratio at all.

Nor did anything like the Coase Theorem play any part in deciding the outcome of the case. The case actually was argued and decided on the basis of it raising a flat clash of unqualified property rights. As (once the facts were proved)<sup>39</sup> the decision that the confectioner was causing a nuisance was reached instantly, *Sturges v Bridgman* as argued is barely a nuisance case at all, though we shall see it does involve, and has come to be authority for, an important implication of the basic principle of the positive law of private nuisance. It effectively being decided at the outset that the noise and vibration was a nuisance, '[t]he only serious point' in the actual argument was whether the defendant 'was entitled ... to ... commit a nuisance' because he 'had

<sup>34</sup> *Sturges v Bridgman* (1879) 11 Ch D 852, 854–5.

<sup>35</sup> Ibid 862 (Thesiger LJ for the Court).

<sup>36</sup> Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 35: 'There were no suggestions that Dr Sturges' activities were causing any problem for Mr Bridgman'. However, Simpson also insists that '[t]he case certainly illustrates the reciprocal nature of the problem of social cost': at 29. We shall return to this; indeed explaining how Simpson can take up both of these positions is an important aim of this article: see below n 167 and accompanying text.

<sup>37</sup> See Coase, 'The Problem of Social Cost', above n 2, 133.

<sup>38</sup> Simpson mentions the doctrinal issues of causation that could possibly arise at this point, but discussion of these, about which Coase no doubt was largely ignorant, cannot be justified here: Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 20.

<sup>39</sup> Using court documents lodged in the United Kingdom Public Record Office: ibid 13–15. Simpson valuably sets these facts out in greater detail than the report of the case itself.

acquired a right to impose the inconvenience [that otherwise] would constitute an actionable nuisance'.<sup>40</sup>

Two in substance identical arguments, one at statute and one at common law, that the confectioner had acquired such a right by prescription were actually considered in the case.<sup>41</sup> At the time of *Sturges v Bridgman*, acquisition by prescription had been made subject to the *Prescription Act 1832*,<sup>42</sup> which is still in force. Though it seems that the Act was meant to completely supersede common law prescription, shortcomings in its drafting meant that it signally failed to do so,<sup>43</sup> and the legal fiction of 'the doctrine of lost modern grant' remained, and continues to remain, part of the English law.<sup>44</sup> Both the statutory and common law arguments were possible because the confectioner had long used the machinery in the way of which the doctor complained, and we shall return to this important fact.<sup>45</sup> But, for reasons of space, we shall not explain why both of these arguments failed,<sup>46</sup> save to say that they were again considered as part of the definition of what would be, as defined, unqualified property rights.

Simpson's account of the way the case was understood, by the parties and by the judges, was right to place the assertion of mutually exclusive unqualified property rights at the heart of the matter — and, believing himself to have established 'the gulf which separates Coase's economic analysis from legal analysis',<sup>47</sup> he undoubtedly showed that Coase's account of the case is, as legal history, just wrong:

<sup>40</sup> *Sturges v Bridgman* (1879) 11 Ch D 852, 855 (Jessel MR), 862 (Thesiger LJ for the Court).

<sup>41</sup> *Ibid* 855 (Jessel MR), 863 (Thesiger LJ for the Court).

<sup>42</sup> *Prescription Act 1832*, 2 & 3 Wm 4, c 71 ('*Prescription Act 1832*').

<sup>43</sup> Simpson's own account of these shortcomings is as clear as the subject permits and it concludes that '[t]he Act is a classic example of an incompetent attempt to reform the law': A W B Simpson, *A History of the Land Law* (Oxford University Press, 2<sup>nd</sup> ed, 1986) 269.

<sup>44</sup> Of this situation, Lord Neuberger, then the Master of the Rolls and now President of the United Kingdom Supreme Court, said in *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2012] 2 All ER 554, 559 [20]:

The law ... [of] long use has been bedevilled with artificial doctrines developed over many centuries, and ... has been complicated rather than assisted by the notoriously ill-drafted *Prescription Act 1832*, whose survival on the statute book for over 175 years provides some support for the adage that only the good die young.

<sup>45</sup> See below nn 90–93 and accompanying text.

<sup>46</sup> Incidentally to the discussion of another of the four cases he uses for illustrative purposes in Part V, Coase does essentially capture the main reason the lost grant argument failed in *Sturges v Bridgman*: Coase, 'The Problem of Social Cost', above n 2, 113 n 13.

<sup>47</sup> Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 23.

from a legal point of view the ... question to settle was whether Mr Bridgman was, as he claimed, entitled to continue his noisy activities, through having, over the years, acquired a right to do so ... It was more or less conceded that unless Mr Bridgman could show that he had acquired such a right he had invaded the rights of the doctor. The judge ruled that no such right had been acquired ... and Dr Sturges got his injunction. Plainly the issue in the case, as seen by Sir George Jessel, had nothing whatever to do with the question — ‘whether the continued use of the machinery adds more to the confectioner’s income than it subtracts from the doctor’s.’ In the legal scheme of things that was not a matter which had to be decided, or indeed had any relevance to the outcome. ... The case was then taken on appeal, and the main issue ventilated was the same — had Mr Bridgman acquired the right to make the noise? The judges thought he had not ... the particular decision pays not the least attention to the ... two conflicting forms of land use. ... [T]he judicial opinions in the case, like the affidavits on which they are based, make not the least attempt to investigate the economic or social value of the activities of either confectioner or doctor.<sup>48</sup>

In our opinion, nothing that Coase said in his reply to Simpson alters this,<sup>49</sup> but to the extent that the main themes of that reply seem to have been a separation of the professional competences of economists and lawyers,<sup>50</sup> and a refusal to defend the positions specifically set out in ‘The Problem of Social Cost’,<sup>51</sup> themes which we regard as eccentric abnegations of his achievement, Coase hardly seemed to wish to effect such an alteration. Nevertheless, the first answer we would give to the question which forms the title of this article is, on the evidence of Coase’s treatment of *Sturges v Bridgman* as we have discussed it so far, very little.

Simpson’s criticism of Coase’s handling of *Sturges v Bridgman* formed the basis of an argument that the Coase Theorem did not, could not, and should not form the basis of deciding nuisance cases. There were, in our opinion, three main points to this criticism:

- 1 the Coase Theorem is ‘purely theoretical’;<sup>52</sup>

<sup>48</sup> Ibid 35–7, quoting Coase, ‘The Problem of Social Cost’, above n 2, 106.

<sup>49</sup> See Coase, ‘Reply to Simpson’, above n 4, 109.

<sup>50</sup> See ibid 103, quoting George J Stigler, ‘Does Economics Have a Useful Past?’ (1969) 1 *History of Political Economy* 217, 219.

<sup>51</sup> Coase, ‘Reply to Simpson’, above n 4, 118.

<sup>52</sup> Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 18. See also at 18–19, 31–2.

- 2 deciding nuisance cases ‘does not’, as a matter of positive law, ‘entail attempting to reach an economically efficient solution’;<sup>53</sup> and
- 3 as a matter of normative law and economics, solving nuisance cases by means of Coasean bargaining would be ‘offensive’.<sup>54</sup>

The first, but only the first, thing that must be said is that no one has pressed the point about the purely theoretical nature of the Coase Theorem more than Coase himself, and in what follows we will explore the implications of this. So completely did Simpson, as Coase alleged in his reply, misunderstand Coase’s theoretical views that he rested his positive and normative arguments about the law of nuisance upon criticism of the Coase Theorem, with the result that those arguments are much inferior to positive and normative arguments about that law derived from Coase himself. In this sense, the answer to the question that forms the title of this article is: yes, a very great deal, far more, in fact, than one of the greatest post-war academic lawyers. But before turning in Part VI of this article to how this paradoxical state of affairs could arise, we would like to say a little more about the nature of Coase’s legal historical mistakes in his discussion of *Sturges v Bridgman*.

#### IV AN EXPLANATION OF COASE’S ACCOUNT OF *STURGES V BRIDGMAN*

An evaluation of Simpson’s criticisms can helpfully begin by asking why Coase relied on *Sturges v Bridgman* to the extent he did in ‘The Federal Communications Commission’ and ‘The Problem of Social Cost’. One needs to bear in mind that Coase’s chief concern in the former article was not with harmful side effects. Though he addressed the then general belief that broadcasting interference was a side effect which necessitated government allocation, his main concern, as a specialist on the economics of public utilities in general and broadcasting in particular, was to establish that broadcasting frequencies should be allocated, not by administrative fiat, but through market-based solutions.<sup>55</sup> His strategy for establishing this point was devastatingly simple: rather than arguing directly why a market-based solution was superior, he sought to demonstrate that the question of allocating resources for the purpose of broadcasting was not different in kind from

<sup>53</sup> Ibid 32–3.

<sup>54</sup> Ibid 40. The detail of Simpson’s criticism is discussed below in Part VI.

<sup>55</sup> See Coase, ‘The Federal Communications Commission’, above n 14, 25–6.

questions of how to allocate economic resources in general. He argued that, given that in the United States economy answers to such questions generally were entrusted to markets, the same should obtain in the broadcasting sector. Rights in frequencies are not different in kind from, for example, rights in land, and once established they allow for the market mechanism to operate in quite the same way as it does in the case of real estate. Broadcasting interference could be effectively regulated by the creation of private rights of exclusive use in frequencies, just as ownership of land regulates potential conflicting uses of land.<sup>56</sup> It was considerations like this which led Coase to consider an actual land use case as a key illustration for his overall argument in ‘The Federal Communications Commission’.

But why *Sturges v Bridgman*? Though we have made no detailed inquiry into this,<sup>57</sup> *Sturges v Bridgman* certainly was regarded as a significant case when it was heard. We assume this played some part in its being placed on the list of the Master of the Rolls, Sir George Jessel, one of the limited number of High Court judgments given by the Master of the Rolls in the brief period between the passage of the *Judicature Acts*<sup>58</sup> and it being decided that the Master of the Rolls’ caseload should be entirely appellate.<sup>59</sup> The case was thought sufficiently important to be reported, not only in *The Law Reports*, but in four other series of reports<sup>60</sup> and in *The Times* of London.<sup>61</sup> As Simpson tells us,<sup>62</sup> it was also noted in a medical professional journal.<sup>63</sup> But Coase, we

<sup>56</sup> Ibid.

<sup>57</sup> Though Simpson uncovered material of very considerable interest (and, characteristically of him, considerable amusement value) about *Sturges v Bridgman*, he did not provide a comprehensive account of the contemporary or later legal doctrinal significance of the case in the way he usually did. The significance the case had for him was that Coase had so heavily relied on it. Simpson may therefore have gone too far when he claimed that he had provided ‘a very full account’ of the case, for he did not really undertake the searching ‘legal archaeological’ inquiry of the sort that has become so identified with him that it is widely called ‘doing a Simpson’: Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 10; see also Michael Taggart, *Private Property and Abuse of Rights in Victorian England* (Oxford University Press, 2002) xi, 195 n 1. But his focus was never on *Sturges v Bridgman* so much as on Coase.

<sup>58</sup> See *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66; *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77 (*‘Judicature Acts’*).

<sup>59</sup> Professor Polden describes the creation and operation of the modern Chancery Division under the *Judicature Acts*: Patrick Polden, ‘The Chancery Division’ in Sir John Baker (ed), *The Oxford History of the Laws of England* (Oxford University Press, 2010) vol XI, pt 3 s X, 832.

<sup>60</sup> (1879) 43 JP 716; (1879) 48 LJ Ch 785, (1879) 28 WR 200; (1879) 41 LT NS 219.

<sup>61</sup> In the High Court: ‘*Sturges v Bridgman*’, *The Times* (London), 4 June 1878, 4; in the Court of Appeal: ‘*Sturges v Bridgman*’, *The Times* (London), 2 July 1879, 6.

<sup>62</sup> Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 11 n 9. Simpson wrongly gives the date of the article as 20 July 1878.



have no doubt, did not properly know and would not have been concerned about the detailed contemporary or historical legal significance of the case and we strongly suspect that he came to it, as so many practising and academic lawyers, not to speak of economists and social theorists, often do, because he saw it cited in a textbook as authority for a legal proposition he thought interesting.

*Sturges v Bridgman* is still routinely cited in English secondary authorities in connection with a number of propositions in land law and the law of nuisance,<sup>64</sup> and Thesiger LJ's observation that 'what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey'<sup>65</sup> is now so widely recognised as almost to have attained within the Commonwealth the status of a legal maxim. Though again we have made no detailed inquiry into the matter, *Sturges v Bridgman* undoubtedly had attained something like this status by 1929,<sup>66</sup> the year in which Coase began his undergraduate studies for

<sup>63</sup> 'Quiet Consulting Rooms', *The Medical Times and Gazette* (London), 8 June 1878, 623; 'A case of considerable interest to the profession'. This account of the judgment in the Chancery Division is far more accurate than most accounts in law textbooks.

<sup>64</sup> It is cited five times in *Halsbury's* in relation to nuisance: LexisNexis, *Halsbury's Laws of England*, vol 78 (at 13 January 2016) Nuisance, '1 Scope of Nuisance' [110], [125]; '2 Legal Proceedings and Defences' [193], [198]; '3 Remedies' [231]. It is also cited in the statement of the law of commons in relation to the doctrine of lost modern grant: at vol 13 (at 13 January 2016) Commons, '2 Rights of Common and Related Rights' [472].

<sup>65</sup> *Sturges v Bridgman* (1879) 11 Ch D 852, 865. This was a hypothetical example unrelated to the actual case, for, although Wigmore Street and Wimpole Street are both now part of a very expensive professional use and residential neighbourhood, they were then quite different from Belgrave Square (though Wigmore Street more so than Wimpole Street) — and, to a smaller degree, they remain so as Belgravia, the area around Belgrave Square (the Square itself now being largely occupied by foreign embassies), must be one of the most expensive residential neighbourhoods in the world. The disappearance of industrial use from Bermondsey makes the hypothetical comparison now entirely inapt. In fact it appears that Mr Bridgman's and Dr Sturges' premises are both now being used, not as a confectionary or even a doctor's consulting rooms, but as the offices of firms of solicitors. We are grateful to Professor Stephen Littlechild for drawing this evidence of the changing use of Wigmore Street and Wimpole Street to our attention.

<sup>66</sup> *Sturges v Bridgman* was cited 16 times in the *Halsbury's* in use when Coase was an undergraduate: Lord Halsbury (ed), *Laws of England: Being a Complete Statement of the Whole Law of England* (Butterworth, 1907–17) vol 4, 487 n (l); at vol 11, 240 n (d), 241 n (e), 259 n (g), 261 n (m), 262 nn (r)–(t), (c), 264 n (u), 266 n (l), 271 n (k), 272 n (a), 302 n (r), 328 n (s); at vol 21, 509 n (l), 531 n (q), 532 n (b), 563 n (q). It would be tedious and of very limited value to list here all the references to *Sturges v Bridgman* in important English torts textbooks at the time of Coase's studies. Of the three such textbooks which Coase cited in 'The Problem of Social Cost', only one had been written when Coase was an undergraduate, and *Sturges v Bridgman* is cited four times in that text: W T S Stallybrass, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* — by Sir John Salmond (Sweet & Maxwell, 7<sup>th</sup> ed, 1928) 257–8 n (e), 261, 264 n (e), 268–9. *Sturges v Bridgman* is also cited four times in the

his Bachelor of Commerce degree at the London School of Economics.<sup>67</sup> Coase has himself said<sup>68</sup> he was led to cases such as *Sturges v Bridgman* in the course of these studies. We have consulted the London School of Economics calendars for the years 1929–30 which contain the syllabuses and reading lists for the subjects which Coase read for his degree,<sup>69</sup> which may be identified from his academic record which we have also consulted. These calendars lead one to think that Coase would not have made any detailed study of the law of tort but would have studied it to the extent necessary to come to terms with commercial subjects, especially regarding negligence in connection with what would now be called employment law and compensation for industrial injury.<sup>70</sup> But this study was not at all profound even in regard of tort in general and, in respect of nuisance, Coase's studies no doubt were rudimentary.

Coase evidently learned how to find at least some cases in the law reports during his undergraduate studies,<sup>71</sup> and he did actually consult the reports of *Sturges v Bridgman* and the other cases discussed in Part V (and also in Part VII) of 'The Problem of Social Cost',<sup>72</sup> — but he would have done so with very limited training at best in the use of primary legal sources, and those cases, including *Sturges v Bridgman*, are difficult cases. As we have said, Coase made

current edition, which is badly out of date: R F V Heuston and R A Buckley, *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell, 21<sup>st</sup> ed, 1996) 58, 61 n 84, 70 n 64, 75–6.

<sup>67</sup> Ronald H Coase, 'Ronald H Coase' in William Breit and Barry T Hirsch (eds), *Lives of the Laureates: Twenty-Three Nobel Economists* (MIT Press, 5<sup>th</sup> ed, 2009) 189, 192.

<sup>68</sup> Ronald Coase, 'The 17<sup>th</sup> Annual Coase Lecture' (Speech delivered at the University of Chicago Law School, Chicago, 1 April 2003) <<https://www.youtube.com/watch?v=yqT6koFnEwA#t=5m46s>>.

<sup>69</sup> We have also consulted the calendar for 1931–32, the year in which, but for the award of the scholarship which allowed him to undertake the travel in the United States — which had such an effect on the thinking that led to 'The Nature of the Firm': R H Coase, 'The Nature of the Firm' in *The Firm, the Market, and the Law* (University of Chicago Press, 1988) 33 — Coase would have undertaken further studies. This would have led to the award of a different degree with more legal content and, in Coase's own view, would 'undoubtedly' have led to his becoming a lawyer: Coase, 'Ronald H Coase', above n 67, 192.

<sup>70</sup> See Coase, 'The 17<sup>th</sup> Annual Coase Lecture', above n 68. The result of Coase's studies in these specific areas, parallel in significance but rather better on the law, is the treatment of 'the directions of an entrepreneur': Coase, 'The Nature of the Firm', above n 69, 39.

<sup>71</sup> Coase, 'Ronald H Coase', above n 67, 200. It may have been misleading for Coase to claim to have obtained a 'familiarity' with the law reports as a result of his studies, but, of course, this is all relative, and by any standard other than the lawyer's own, he did have such a familiarity. The sometimes daunting difficulties of searching the various reports have, of course, largely been eliminated in these days of computerised research, but *Sturges v Bridgman* would have been quite an easy case to find by the old technique of going to a library shelf.

<sup>72</sup> Ibid 201.

no pretension to ability in legal scholarship, and his discussion of *Sturges v Bridgman* as we have examined it so far would lead one to think he was wise not to do so. We nevertheless cannot but feel that Simpson has been somewhat parochial and extremely uncharitable about all this. To purport to actually discuss legal cases in detail in an article of the nature of 'The Problem of Social Cost' as Coase did was an extraordinary thing for an economist to do in 1960. More importantly than leaving oneself open to possible exposure of error by lawyers, one certainly courted flat incomprehension or rejection by economists, and this is what overwhelmingly happened to Coase's (other than purely theoretical) argument for more than two decades after his article was published.

The story of how Coase defended his analysis as he had first formulated it in 'The Federal Communications Commission' before some of the faculty of the Department of Economics at The University of Chicago, and how this led to his being invited to write up the argument more fully in the form it eventually took in 'The Problem of Social Cost', is too well known to need rehearsing here.<sup>73</sup> But this important instance of Coase persuading an initially sceptical audience of economists is an exception that proves a rule. Much more typical of the reception of 'The Problem of Social Cost' was Arrow and Scitovsky's decision not to include it in the third part, headed 'Social versus Private Costs and Benefits', of the collection of essays on welfare economics published in 1969 as vol XII of the American Economic Association's very prestigious Series of Republished Articles on Economics. '[U]nfortunately', Arrow and Scitovsky wrote, Coase's article 'with its many legal examples, was too long for inclusion'.<sup>74</sup> We ourselves think that Coase took an enormously bold step in giving reported cases such prominence in 'The Problem of Social Cost', for which Simpson does not give him any credit, and, amazing to say, for which we do not think he has since generally received sufficient credit.

The enormous credit Coase has received for work in the vein of 'The Problem of Social Cost' has largely been for advocating the Coase Theorem as a guide to practical policy.<sup>75</sup> Although Coase stressed that the government, the

<sup>73</sup> See generally Coase, 'Reply to Simpson', above n 4, 107.

<sup>74</sup> Kenneth J Arrow and Tibor Scitovsky (eds), *Readings in Welfare Economics* (George Allen and Unwin, 1969) 183–4.

<sup>75</sup> After it had been rescued from obscurity, the way 'The Nature of the Firm' has influenced discussion of industrial organisation has much more commonly been based on an essentially accurate interpretation of Coase's actual argument in that article. It is, however, a puzzle that Coase did not comment on the way that the 'agency theory' of the firm, to which economists he admired made major contributions, completely contradicts his views.

‘custodian of [the] frequencies’,<sup>76</sup> should have an essential role in ‘[t]he creation of ... rights in the use of frequencies’,<sup>77</sup> it is fair to say that Coase did have something like the Coase Theorem in mind as the impulse for his plea for replacing administrative allocation of broadcasting frequencies by government with a market-based solution. But in ‘The Problem of Social Cost’ his arguments were expressed in a much more nuanced fashion as a result of his explicit consideration of the effect of transaction costs on the results of his analysis.<sup>78</sup> There is thus more than a little to his repeated complaints that his ‘point of view has not in general commanded assent, nor has my argument, for the most part, been understood’:

The extensive discussion [of ‘The Problem of Social Cost’] in the journals has concentrated almost entirely on the ‘Coase Theorem,’ a proposition about the world of zero transaction costs. This response, though disappointing, is understandable. The world of zero transaction costs, to which the Coase Theorem applies, is the world of modern economic analysis, and economists therefore feel quite comfortable handling the intellectual problems it poses, remote from the real world though they may be. ... [I]f I am right, current economic analysis is incapable of handling many of the problems to which it purports to give answers. ... [D]iscussion of the Coase Theorem is ... but a preliminary to the development of an analytical system capable of tackling the problems posed by the real world of positive transaction costs.<sup>79</sup>

In sum, ‘[t]he world of zero transaction costs has often been described as a Coasean world. Nothing could be further from the truth. It is the world of modern economic theory, one which I was hoping to persuade economists to leave’.<sup>80</sup>

<sup>76</sup> Coase, ‘The Federal Communications Commission’, above n 14, 21.

<sup>77</sup> Ibid 25–6.

<sup>78</sup> M Klaes, ‘Transaction Costs, History of’ in Steven N Durlauf and Lawrence E Blume (eds), *The New Palgrave Dictionary of Economics* (Palgrave Macmillan, 2<sup>nd</sup> ed, 2008) vol 8, 364.

<sup>79</sup> R H Coase, ‘The Firm, the Market and the Law’ in R H Coase (ed), *The Firm, the Market, and the Law* (University of Chicago Press, 1988) 1, 1, 15.

<sup>80</sup> Coase, ‘Notes on the Problem of Social Cost’, above n 19, 174. We have taken quotations from materials potentially available to Simpson in 1996. Coase’s later rejections of the Coase Theorem were often even more strongly stated. For example, in a 2012 interview he said ‘I never liked “the Coase Theorem” ... I don’t like it because it’s a proposition about a system in which there were no transaction costs. It’s a system which couldn’t exist. And therefore it’s quite unimaginable’: Russ Roberts, Interview with Ronald Coase (Podcast Interview, 8 May 2012) <[http://www.econtalk.org/archives/2012/05/coase\\_on\\_extern.html](http://www.econtalk.org/archives/2012/05/coase_on_extern.html)>.

Most economists, lawyers and social theorists still hold to Simpson's representative position that Coase believed that the Coase Theorem *could* be a guide to practical policy. That Coase gave some sanction for this in the way he himself treated cases such as *Sturges v Bridgman* in 'The Problem of Social Cost' does not absolve those who remain wedded to such a restricted and simplistic reading of the article, but we shall now try to assess the extent to which Coase gave them a warrant for this.

## V THE THEORETICAL SHORTCOMINGS AND THE THEORETICAL VALUE OF COASE'S ACCOUNT

### A *Where Coase Went Quite Wrong*

It can hardly be denied that 'The Problem of Social Cost' is a poorly organised article and we wish to argue here that this poor organisation has played a considerable part in the widespread misunderstanding of its argument. It will be recalled that *Sturges v Bridgman* was one of four 'actual' cases discussed in Part V of 'The Problem of Social Cost' in order to 'clarify' and 'illustrate' the previous argument which had set up what has come to be known as the Coase Theorem. But however laudable Coase's wish to relate this theoretical argument to actual cases, to bring these cases in at this point was rather ill-advised, for, because they are actual cases, the last thing one could say about them is that they illustrate what would happen at zero transaction costs, which is the assumption on which Coase proceeds in Part V. As Simpson put it:

Let us now turn from economic theory to the mundane world of legal decision, as exemplified in the story of *Sturges v Bridgman*. ... [T]he issue in the case, as seen by Sir George Jessel, had nothing whatever to do with the question — 'whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's'.<sup>81</sup>

Coase, it must be said, principally got around this difficulty in Part V by talking about bargaining which simply did not happen in the reported case and which certainly did not form part of its ratio.<sup>82</sup> In mitigation of what Coase did, one could say that he succumbed here to a typical methodological strategy of the economist: that of the hypothetical thought experiment. Once

<sup>81</sup> Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 29, 35, quoting Coase, 'The Problem of Social Cost', above n 2, 106.

<sup>82</sup> See below n 189.

economists have established the key features of an economic setting, they will often then consider variations in those features, and this seems to underlie Coase's procedure when he recast *Sturges v Bridgman* in a hypothetical bilateral bargaining setting which conveniently abstracts from any complexities arising in a world of positive transaction costs.

Ironically, *Sturges v Bridgman* was, as we have mentioned, an early case heard in the English civil courts reformed under the *Judicature Acts* — passed, of course, in response to public disgust at the delay, error and expense of the civil legal process so memorably condemned by Charles Dickens in *Bleak House*.<sup>83</sup> But nevertheless, as Simpson repeatedly insisted, litigation such as *Sturges v Bridgman* was 'very expensive,' and '[g]iven the costs of litigation',<sup>84</sup> to use such a process to illustrate an economically efficient bilateral bargaining solution was, as we have said, rather ill-advised, for it was bound to mislead. Even though it might be allowed that his overall intentions are clear, one cannot but level at Coase's use of *Sturges v Bridgman* (and the other cases in Part V) the criticism he himself famously levelled at those economists who had used the lighthouse as an illustration of the argument for public goods: the illustration serves only 'to provide "corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative"'.<sup>85</sup>

Coase began Part VI, headed 'The Cost of Market Transactions Taken into Account', by saying that

<sup>83</sup> See, eg, Charles Dickens, *Bleak House* (Penguin, 1985).

<sup>84</sup> Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 19 n 25; see also at 30–1.

<sup>85</sup> R H Coase, 'The Lighthouse in Economics' in *The Firm, The Market, and the Law* (University of Chicago Press, 1988) 187, 211. Coase was borrowing a line from W S Gilbert's libretto for *The Mikado*: see, eg, W S Gilbert, *The Mikado* in Ian Bradley (ed), *The Complete Annotated Gilbert and Sullivan* (Oxford University Press, 1996) 551, 635. This article has itself been criticised for not getting the relevant facts right: Elodie Bertrand, 'The Coasean Analysis of Lighthouse Financing: Myths and Realities' (2006) 30 *Cambridge Journal of Economics* 389, 390. Coase's work is at the moment being subjected to a general criticism in this regard since his overall aim when applying empirical argument was in most cases illustrative rather than systematic, and in many instances was based on selective reference to secondary literature or official material. Those parts of his work that result from specialist, in-depth study of the relevant empirical context, — his outstanding specialism was the broadcasting industry in general and the British Broadcasting Corporation in particular — do seem to have stood the test of time: R H Coase, *British Broadcasting: A Study in Monopoly* (Longmans, Green, 1950). See also Richard Collins and Zoe Sujon, 'UK Broadcasting Policy: The "Long Wave" Shift in Conceptions of Accountability' in Paolo Baldi and Uwe Hasebrink (eds), *Broadcasters and Citizens in Europe: Trends in Media Accountability and Viewer Participation* (Intellect, 2007) 33, 41–2; Andrea Prat and David Strömberg, 'The Political Economy of Mass Media' in Daron Acemoglu, Manuel Arellano and Eddie Dekel (eds), *Advances in Economics and Econometrics — Tenth World Congress, Volume II: Applied Economics* (Cambridge University Press, 2013) 135, 181 n 19.

[t]he argument has proceeded up to this point on the assumption (explicit in [Parts] III and IV and tacit in [Part] V) that there were no costs involved in carrying out market transactions. This is of course a very unrealistic assumption.<sup>86</sup>

Part VI then proceeded on the basis of positive transaction costs, when, as we shall see

[t]he same approach which, with zero transaction costs, demonstrates that the allocation of resources remains the same whatever the legal position, also shows that, with positive transaction costs, the law plays a crucial role in determining how resources are used.<sup>87</sup>

In Part VII, headed ‘The Legal Delimitation of Rights and the Economic Problem’, Coase sought to show how, when transaction costs were positive, decisions were reached in a number of actual cases, and we argue that he was theoretically right about this. The opportunity surely was there to contrast how cases would have been decided at zero transaction costs in Part V (illustrative of Parts III and IV) with how they were decided when transaction costs were positive in Part VII (illustrative of Part VI).

But of the four cases discussed in Part V, Coase returns only to *Sturges v Bridgman* in Part VII,<sup>88</sup> and the contrast does not at all emerge between its treatment there (when transaction costs are positive) and in Part V (when transaction costs are zero). This was for two very good reasons. First, as we have examined it so far, the initial account Coase gave of the case in Part V was entirely made-up, in line with his use of the case as a hypothetical, although any fair reading would take what Coase said to be an account of what actually happened in the case. Secondly, when Coase did turn to the

<sup>86</sup> Coase, ‘The Problem of Social Cost’, above n 2, 114.

<sup>87</sup> Coase, ‘Notes on the Problem of Social Cost’, above n 19, 178. The most succinct statement of his actual position can be found in his Nobel Lecture, Coase, *Essays on Economics and Economists*, above n 19, 11:

If we move from a regime of zero transaction costs to one of positive transaction costs, what becomes immediately clear is the crucial importance of the legal system in this new world. ... While we can imagine in the hypothetical world of zero transaction costs that the parties to an exchange would negotiate to change any provision of the law which prevents them from taking whatever steps are required to increase the value of production, in the real world of positive transaction costs such a procedure would be extremely costly and would make unprofitable, even where it was allowed, a great deal of such contracting around the law. Because of this, the rights which individuals possess, with their duties and privileges, will be, to a large extent, what the law determines. As a result, the legal system will have a profound effect on the working of the economic system and may in certain respects be said to control it.

<sup>88</sup> Coase, ‘The Problem of Social Cost’, above n 2, 122–3.

actual decision in *Sturges v Bridgman* in Part V, at the end of the longer, second paragraph of his discussion of the case, he anticipated what he should have said, but only very briefly and unsatisfactorily did say, in Part VI, when that material simply does not belong in Part V. Coase no doubt was right to complain of the very pronounced focus on Parts III and IV, and corollary neglect of ‘other aspects of the analysis’ in commentary on ‘The Problem of Social Cost’,<sup>89</sup> but it must be said he invited it. What he did was path breaking, but it was also very confusing. Much subsequent work of reinterpretation has been required to dispel this confusion. But in the course of this work, many commentators have actually moved away from the bargaining framework for economics fundamentally offered by Coase, and it is in this sense that we here seek to, as it were, complete this reinterpretation by relating it back to the detail of the argument of ‘The Problem of Social Cost’ itself.

### B Where Coase Was Very Right

If, as Simpson was right to claim, the parties in *Sturges v Bridgman* and the judges hearing the case understood it as a case of a clash of incompatible unqualified property rights, then one is obliged to ask why and how that clash was resolved in the doctor’s favour. As we have seen, the principal legal question actually addressed in the case was, it being immediately taken the confectioner was causing a nuisance, whether he had acquired a prescriptive right to do so, and it was decided that, despite the confectioner having long used the machinery in the way of which the doctor complained, he had not. Continuing to put the common law and *Prescription Act 1832* to one side, we want to address the vital question which surely arises for the understanding of the case and for understanding the doctrinal and theoretical issues in the law of nuisance which underpin it: why was it believed to be so obvious that the confectioner was committing a nuisance?

To the layperson and to students first coming to the case, the very peculiar feature of *Sturges v Bridgman* is that, though the confectioner was liable, it was the doctor who, in the view of the layperson and the neophyte, caused the nuisance. The confectioner (and his father) had carried out the same business on the same premises for more than 60 years and had been using the machinery in the way of which the doctor complained for 26 years prior to the litigation.<sup>90</sup> It was only when in 1873, five years before the matter reached the

<sup>89</sup> Coase, ‘The Firm, the Market and the Law’, above n 79, 13.

<sup>90</sup> *Sturges v Bridgman* (1879) 11 Ch D 852, 853–4. Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 1114, helpfully gave previously unknown concrete details of this aspect of the case,



Chancery Division, the doctor built the consulting room, one of the walls of which was a party-wall with the confectioner, that the nuisance arose.<sup>91</sup> The wall was built to normal standards, but being a party-wall it very effectively transmitted the noise and vibration. Tort students typically struggle to appreciate how the doctor was able to, as they initially see it, cause the problem and yet the confectioner be held liable for the nuisance.

*Sturges v Bridgman* is now mainly known as authority for the paradoxical proposition that a plaintiff can ‘move (or come) to a nuisance’. This possibility arises from the nature of the modern law of private nuisance. That law does not prevent ‘interference’ with the enjoyment of land. It prevents ‘unreasonable’ interference with such enjoyment.<sup>92</sup> This, of course, makes determining whether the interference, and the use that gives rise to the interference, is reasonable or unreasonable central to the tort. The modern law of nuisance is not a matter of unqualified property rights, but rather is wholly contingent.<sup>93</sup> The legal history of the emergence of the modern law of nuisance has been most informatively described in celebrated articles by Professors Brenner and McLaren<sup>94</sup> as a process by which distance was taken from the maxim *sic utere*

of which torts scholars (and Coase) had been only generally aware from the reporter’s statement of the facts: see also Coase, ‘The Problem of Social Cost’, above n 2, 105. In particular, Dr Sturges only began to lease the premises in 1865, and lived and conducted his profession there without any problem until he built the consulting room eight years after moving in.

<sup>91</sup> *Sturges v Bridgman* (1879) 11 Ch D 852, 853, 855 (Jessel MR).

<sup>92</sup> See Donald Harris, David Campbell and Roger Halson, *Remedies in Contract and Tort* (Cambridge University Press, 2<sup>nd</sup> ed, 2005) 465–8.

<sup>93</sup> David Campbell, ‘Of Coase and Corn: A (Sort of) Defence of Private Nuisance’ (2000) 63 *Modern Law Review* 197, 203.

<sup>94</sup> Joel Franklin Brenner, ‘Nuisance Law and the Industrial Revolution’ (1974) 3 *Journal of Legal Studies* 403; John P S McLaren, ‘Nuisance Law and the Industrial Revolution — Some Lessons from Social History’ (1983) 3 *Oxford Journal of Legal Studies* 155. See also Ben Pontin, ‘Tort Law and Victorian Government Growth: The Historiographical Significance of Tort in the Shadow of Chemical Pollution and Factory Safety Regulation’ (1998) 18 *Oxford Journal of Legal Studies* 661; Noga Morag-Levine, *Chasing the Wind: Regulating Air Pollution in the Common Law State* (Princeton University Press, 2003) ch 3. In his more recent work, Pontin has sought to revisit the issue of the relative importance of the substance of, and of access to, the law raised by Brenner and McLaren. Despite its great interest, the only brief discussion of Simpson in these works renders it somewhat tangential to the core issues we wish to discuss: see Ben Pontin, ‘Integrated Pollution Control in Victorian Britain: Rethinking Progress within the History of Environmental Law’ (2007) 19 *Journal of Environmental Law* 173; B Pontin, ‘The Secret Achievements of Nineteenth Century Nuisance Law: *Attorney-General v Birmingham Corporation* (1858–95) in Context’ (2007) 19 *Environmental Law and Management* 271; Ben Pontin, ‘*Tipping v St Helens Smelting* (1865): “Anti-development” or “Sustainable Development”?’ (2007) 19 *Environmental Law and Management* 157; Ben Pontin, ‘Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence’ (2012) 75 *Modern Law Review* 1010, 1022 n 68; Ben Pontin, ‘The Com-

*tuo ut alienum non laedas*,<sup>95</sup> under which the defendant was subject to strict, if not absolute,<sup>96</sup> liability for any interference. Liability depends on ‘what is reasonable [use] according to the ordinary usages of mankind living in ... a particular society’<sup>97</sup> and ‘is a matter of balancing the conflicting interests of the two neighbours’.<sup>98</sup> Under the ‘rule of give and take’,<sup>99</sup> occupiers must accept as much interference with each other’s enjoyment as is reasonable in the neighbourhood in question.

The principal reason given for why nuisance liability has come to be decided on a give and take basis rather than by adherence to the *sic utere* maxim is that the latter would hinder or even prevent economic growth. The spirit of the ‘reasonable use’ at the core of the English law of private nuisance is as it was expressed in 1858 in *Hole v Barlow*:

It is not every body whose enjoyment of life and property is rendered uncomfortable by the carrying on of an offensive or noxious trade in the neighbourhood, that can bring an action. If that were so, ... the ... great manufacturing towns of England would be full of persons bringing actions for nuisances arising from the carrying on of noxious or offensive trades in their vicinity, to the great injury of the manufacturing and social interests of the community.<sup>100</sup>

mon Law Clean Up of the “Workshop of the World”: More Realism about Nuisance Law’s Historic Environmental Achievements’ (2013) 40 *Journal of Law and Society* 173, 174 nn 5–6; Ben Pontin, *Nuisance Law and Environmental Protection: A Study of Nuisance Injunctions in Practice* (Lawtext Publishing, 2013) 68, 83, 92–5; A W Brian Simpson, *Leading Cases in the Common Law* (Oxford University Press, 1995) 163 (‘*Leading Cases*’). See also below nn 123–3 and accompanying text. See generally Leslie Rosenthal, *The River Pollution Dilemma in Victorian England: Nuisance Law versus Economic Efficiency* (Ashgate, 2014).

<sup>95</sup> R H Kersley, *A Selection of Legal Maxims: Classified and Illustrated — by Herbert Broom* (Sweet & Maxwell, 10<sup>th</sup> ed, 1939) 238: ‘enjoy your own property in such a manner as not to injure that of another person.’

<sup>96</sup> A very great deal of what one does on one’s own land can be shown by the standards of the physical sciences to ‘interfere’ with neighbouring land, but the *sic utere* rule did not, of course, turn on these standards. The law of nuisance has always in part distinguished reasonable and unreasonable interference by regarding some interference as *de minimis* or, perhaps part of the same idea, so much an inevitable, and practically irremediable, part of social coexistence as to be *damnum sine injuria*: ‘injury with no condemnation [damages]’. This is the background to the difficulty of Coase’s reference to the ancient windmill case, which seems to turn on obstruction of the general flow of wind: Coase, ‘The Problem of Social Cost’, above n 2, 121, citing Bowles, above n 15, 238 n 6.

<sup>97</sup> *Sedleigh-Denfield v O’Callaghan* [1940] AC 880, 903 (Wright LJ).

<sup>98</sup> *Miller v Jackson* [1977] 1 QB 966, 981 (Lord Denning MR).

<sup>99</sup> *Bamford v Turnley* (1862) 3 B and S 66, 84; 122 ER 27, 33. (Williams J for the Court).

<sup>100</sup> (1858) 4 CB NS 334, 335; 140 ER 1113, 1114 (Byles J). As in *Sturges v Bridgman*, Belgrave Square is given as a hypothetical example of a neighbourhood where industrial use unargua-

By broadly regarding industrial pollution as reasonable interference, the law of private nuisance made, it is argued, industrialisation possible.

*Sturges v Bridgman* illustrates the contingent nature of private nuisance particularly well. In what had been a manufacturing neighbourhood but was at the time of the case an ‘improving’ neighbourhood becoming dominated by professional practices and concomitant residential use,<sup>101</sup> noise and vibration such as was being caused by the confectioner was a nuisance. If that noise and vibration had been caused in a neighbourhood dominated by manufacturing use and thought to have no other prospect, it would not have been a nuisance. This is the gist of the famous dictum we have already quoted that ‘what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey’.<sup>102</sup> The particular difficulty arises, however, that neighbourhoods do not remain of the same character. A court faced with possible changing use must in effect decide which use is most valuable in order to decide whether there is a nuisance.

Though, as we have said, there is no actual discussion of why the confectioner’s use was regarded as a nuisance, the Belgrave Square hypothetical example sheds light on why this was so readily taken to be the case. Thesiger LJ considered the confectioner’s argument that if the refusal to find that the confectioner’s use gave rise to a prescriptive right:

were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go — say into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavoury character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. The case also is put of a blacksmith’s forge built away from all habitations, but to which, in course of time, habitations approach.<sup>103</sup>

bly would be a nuisance. Coase, ‘The Problem of Social Cost’, above n 2, 121 n 18, cites *A-G ex rel Gray’s Inn Society v Doughty* (1752) 2 Ves Sen 453; 28 ER 290 and gives as a United States comparison the obscurely reported but nevertheless well-known *dictum* of Musmanno J in *Versailles Borough v McKeesport Coal and Coke Co*, 83 Pittsburgh Legal Journal 379, 385 (Allegheny County Ct Com Pl, 1935): ‘Without smoke, Pittsburgh would have remained a very pretty village’. Finding for the defendant smoke emitter, Musmanno J consoled the plaintiffs with the observation that ‘it is probable that upon reflection they will, in spite of the annoyance which they suffer, still conclude that, after all, one’s bread is more important than landscape or clear skies’: Morag-Levine, above n 94, 95 n 37.

<sup>101</sup> See generally Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 12–13.

<sup>102</sup> *Sturges v Bridgman* (1879) 11 Ch D 852, 865 (Thesiger LJ for the Court).

<sup>103</sup> *Ibid.*

To this Thesiger LJ responded:

We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith's forge, that is really an *idem per idem* case with the present. It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand in an equally degree unjust, and, from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbour, but the neighbour himself would be powerless in the matter. Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes.<sup>104</sup>

When it is a question of a private resident moving into a neighbourhood it is believed will remain industrial, there is no nuisance. When it is a question of a blacksmith seeking to continue as a smith in an area thought to have prospects of becoming residential, there is a nuisance. When it is a question of a doctor moving into an industrial neighbourhood thought to have prospects

<sup>104</sup> Ibid 865–6. Jessel MR had considered the blacksmith example, and his view was that the blacksmith should not be allowed effectively to prevent residential development when land ‘which is useless as a barren moor becomes available for building land by reason of the growth of a neighbouring town’ because this would be to say ‘that the owner has lost the right to this barren moor, which has now become worth perhaps hundreds of thousands of pounds, by being unable to build upon it by reason of this noisy business?’: at 858–9.

of becoming one of professional use, there is a nuisance. To these possibilities considered in *Sturges v Bridgman* we should add the paradigm case that lies behind these other cases, of the industrial polluter beginning production in a formerly unpolluted neighbourhood but where industrial use is thought to be the future, when the industrial use and the interference by pollution will be found to be reasonable. It seems to us perfectly sensible for Coase to call this ‘planning and zoning by the judiciary’,<sup>105</sup> and we take it to be a measure of Simpson’s failure to grasp the fundamental issue that he dismissively criticises the idea that a ‘zoning’ problem was involved at all.<sup>106</sup>

In ‘The Problem of Social Cost’, Coase refers to the passage from the Court of Appeal’s judgment we have just quoted as evidence that ‘the judges were thinking of the economic consequences of alternative decisions’.<sup>107</sup> One must read this in the context of the general observation Coase makes that, though it ‘would be of great interest’ to do so, he had ‘not been able’ to make ‘[a] thorough examination of the presuppositions of the courts in trying such cases’ — but that nevertheless his ‘ cursory study’ had shown ‘that the courts have often recognised the economic implications of their decisions’, albeit that they ‘do not always refer very clearly to the economic problems posed by the cases brought before them’.<sup>108</sup> Read in this context, his view of the nuisance aspect of *Sturges v Bridgman* is wonderfully penetrating. It is, in our opinion, not merely the best but the only basis of an explanation of the give and take basis of the modern law of nuisance in general:

a comparison between the utility and harm produced is an element in deciding whether a harmful effect should be considered a nuisance. ... [T]he courts, in cases relating to nuisance, are, in effect, making a decision on the economic problem and determining how resources are to be employed.<sup>109</sup>

That this explanation needs to be restated in terms more conversant with the legal doctrines of nuisance seems almost a carping criticism when set next to the fact, a remarkable achievement by anyone, not merely one who made

<sup>105</sup> Coase, ‘The Problem of Social Cost’, above n 2, 123, quoting Charles M Haar, *Land-Use Planning: A Casebook on the Use, Misuse and Re-use of Urban Land* (Little, Brown, 1959) 95. Haar’s work contains this phrase in a chapter entitled “‘Sic Utere Tuo ...’: Reconciliation by the Judiciary of Discordant Land Uses’. See also Charles M Haar and Michael Allan Wolf, *Land-Use Planning and the Environment: A Casebook* (Environmental Law Institute, 2010) ch 2.

<sup>106</sup> Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 12–13. See also at 22.

<sup>107</sup> Coase, ‘The Problem of Social Cost’, above n 2, 122.

<sup>108</sup> *Ibid* 119–20, 123.

<sup>109</sup> *Ibid* 120, 132–3.

no pretence to competence in legal scholarship, that it *can* be set out in such a way.<sup>110</sup>

It will be recalled that in our earlier discussion of Coase's treatment of *Sturges v Bridgman* in Part V of 'The Problem of Social Cost' we mentioned that Coase ended the first paragraph of that analysis, which purports to be of the actual argument in the case but is not, with an unattributed quotation from the Court of Appeal's judgment. It is the concluding sentence of the long quotation just given.<sup>111</sup> It will also be recalled that we also ended our discussion of Coase's analysis in Part V of the 'The Problem of Social Cost' before the end of its second paragraph, at the start of a passage we now quote in full:

It was of course the view of the judges that they were affecting the working of the economic system — and in a desirable direction. Any other decision would have had 'a prejudicial effect upon the development of land for residential purposes,' an argument which was elaborated by examining the example of a forge operating on a barren moor which was later developed for residential purposes. The judges' view that they were settling how the land was to be used would be true only in the case in which the costs of carrying out the necessary market transactions exceeded the gain which might be achieved by any arrangement of rights. And it would be desirable to preserve the areas (Wimpole Street or the moor) for residential or professional use (by giving non-industrial users the right to stop the noise, vibration, smoke, etc., by injunction) only if the value of the additional residential facilities obtained was greater than the value of cakes or iron lost. But of this the judges seem to have been unaware.<sup>112</sup>

As an analysis of the actual arguments which were, or might have been, made in the case, this is completely inaccurate. It had no business being made part of an account of *Sturges v Bridgman*. It had no business appearing in Part V at all because it is worse than useless as an illustration of the Coase Theorem. But as an analysis of the background thinking that led the Courts to believe that the nuisance issue (which to the layperson and the neophyte is a

<sup>110</sup> It is very instructive to compare the doctrinally superficial but theoretically profound discussion of the requirement that a nuisance be 'substantial' in Coase, 'The Problem of Social Cost', above n 2, 120–1, with the almost contemporaneous, but independently arrived at, doctrinally impeccable discussion of that requirement in Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 *Yale Law Journal* 499, 534–40. See especially at 536–7.

<sup>111</sup> *Sturges v Bridgman* (1879) 11 Ch D 852, 865–6 (Thesiger LJ); Coase, 'The Problem of Social Cost', above n 2, 105; above n 104 and accompanying text.

<sup>112</sup> Coase, 'The Problem of Social Cost', above n 2, 106–7.

particularly vexed one) was so straightforward that it needed no more than a gestural discussion, it is seminal.

## VI ANALYSIS OF THE DETAIL OF SIMPSON'S CRITICISM

Simpson, as we have seen, accepts none of this and we have argued above in Part IV that there are three main points to the criticism which leads him to refuse to do so. Let us consider each of these in turn.

### A *The Coase Theorem is 'Purely Theoretical'*

It is helpful here to juxtapose two passages expressing Simpson's principal criticism of the Coase Theorem and Coase's own views about that Theorem. Simpson wrote:

the Coase Theorem ... is of course a purely theoretical view as to what would happen in a world which does not exist. ... Coasean cost benefit analysis bears no relationship at all to how neighbours behave in real life situations ... It may be that in some imagined world some such analysis would take place, but lawyers are concerned with the real world. Law involves practical reason. It is unclear to me what lawyers can learn from an imagined world. ... [T]he whole idea of an ideally efficient solution is it itself, from a practical point of view, vacuous. ... [W]hatever the theoretical utility of the ideal conception of economic efficiency may be, it is devoid of empirical or practical significance. It is the crock of gold at the end of a rainbow.<sup>113</sup>

And Coase wrote:

The extensive discussion [of 'The Problem of Social Cost'] in the journals has concentrated almost entirely on the 'Coase Theorem,' a proposition about the world of zero transaction costs. This response, though disappointing, is understandable. The world of zero transaction costs, to which the Coase Theorem applies, is the world of modern economic analysis, and economists therefore feel quite comfortable handling the intellectual problems it poses, remote from the real world though they may be. ... [I]f I am right, current economic analysis is incapable of handling many of the problems to which it purports to give answers. ... [D]iscussion of the Coase Theorem is ... but a preliminary to the de-

<sup>113</sup> Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 18, 32, 40.

velopment of an analytical system capable of tackling the problems posed by the real world of positive transaction costs.<sup>114</sup>

Though it understandably drew a rebuke from Simpson, as the complaint should have been better put,<sup>115</sup> we think Coase was entitled to complain that Simpson did not grasp the important argument that had emerged in the vast literature on ‘The Problem of Social Cost’ that the Coase Theorem *is* purely theoretical and of no direct value in the formulation of policy.<sup>116</sup> By 1996, the year the debate we are discussing was published, the belief that Coase thought that the Coase Theorem could have such a value had been shown to be quite wrong.<sup>117</sup> The way was led by Medema in economic history<sup>118</sup> and Schlag in law,<sup>119</sup> but Coase himself was the main contributor. Simpson seems to have had some inkling that his criticisms of Coase were not entirely accurate.<sup>120</sup> But a complete lack of sympathy with ‘economic rationality’ prevented him from seeing that Coase was one of the most radical (and successful) critics of key dimensions of the neoclassical mainstream of modern economics, and this led Simpson continually to attribute to Coase positions it was the entire purpose of ‘The Problem of Social Cost’ to reject. The issues of theoretical interest in the interpretation of Coase now lie elsewhere,<sup>121</sup> and there is no need to show that Simpson profoundly misunderstands Coase’s theoretical views in general. But let us take up those parts of his misunderstanding that have a direct bearing on the law of nuisance as it is and as it could be.

<sup>114</sup> Coase, ‘The Firm, the Market and the Law,’ above n 79, 15.

<sup>115</sup> Simpson, ‘An Addendum,’ above n 5, 101.

<sup>116</sup> Coase, ‘Reply to Simpson,’ above n 4, 105.

<sup>117</sup> David Campbell, ‘On What is Valuable in Law and Economics’ (1996) 8 *Otago Law Review* 489, 498–505.

<sup>118</sup> Steven G Medema, ‘The Myth of Two Coases: What Coase Is Really Saying’ (1994) 28 *Journal of Economic Issues* 208, 209–10, quoting R H Coase, ‘The Coase Theorem and the Empty Core: A Comment’ (1981) 24 *Journal of Law and Economics* 183, 187.

<sup>119</sup> Pierre Schlag, ‘An Appreciative Comment on Coase’s The Problem of Social Cost: A View from the Left’ [1986] *Wisconsin Law Review* 919. Schlag was able to build on points which had been raised by Calabresi: Guido Calabresi, ‘Some Thoughts on Risk Distribution and the Law of Torts’ (1961) 70 *Yale Law Journal* 499. But Calabresi’s first article dedicated to the direct reinterpretation of Coase was Guido Calabresi, ‘The Pointlessness of Pareto: Carrying Coase Further’ (1991) 100 *Yale Law Journal* 1211.

<sup>120</sup> See Simpson, ‘The Story of *Sturges v Bridgman*,’ above n 1, 17.

<sup>121</sup> David Campbell and Matthias Klaes, ‘The Principle of Institutional Direction: Coase’s Regulatory Critique of Intervention’ (2005) 29 *Cambridge Journal of Economics* 263, 277.



B *Solving Nuisance Cases ‘Does Not Entail Attempting To Reach  
an Economically Efficient Solution’*

We have argued that Coase was right to maintain that some notion of economic efficiency does lie behind decision-making in nuisance cases. As we have seen, Simpson flatly denied this, and, as a matter of legal history, he claimed that: ‘After some controversy it came to be settled in mid-nineteenth century common law that this basic principle was not to be displaced by the public interest in economic development’.<sup>122</sup> Making this claim involved him taking a very different line than the works of legal history which argued that the modern law of nuisance is based on its distance from the *sic utere* rule to which we have previously referred, and he did so, not so much in the article we are discussing, but in a chapter of his *Leading Cases in the Common Law* written at about the same time.<sup>123</sup> This chapter examined a very important Victorian nuisance case, *St Helen’s Smelting Co v Tipping* (*‘Tipping’*),<sup>124</sup> which Simpson claimed resolved the conflict between the *sic utere* and the give and take principles in favour of the former. Simpson’s outstanding eminence as a legal historian and the fact that he is but recently deceased make one reluctant to say, as we are obliged to do, that his doing this involved misinterpreting both *Tipping*, which actually was part of the process of abandonment of the *sic utere* rule, and of McLaren’s important work of legal history which we have mentioned.

In *Tipping* a private landowner obtained an injunction against a neighbouring copper smelting works and ultimately forced the works to close. Very noxious emissions, principally from a chimney less than half a mile from the landowner’s property, were found to have inter alia damaged trees and other cultivated plants on the property. But *Tipping* turned on a distinction which was drawn between ‘material injury to the property’, such as the visible damage done to the trees and plants, and more general ‘inconvenience and interference with one’s enjoyment’,<sup>125</sup> and this distinction has been repeatedly observed in subsequent nuisance cases. This distinction is, of course, ultimate-

<sup>122</sup> Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 38 (citations omitted).

<sup>123</sup> Simpson, *Leading Cases*, above n 94, ch 7. In a 2001 edition of *Leading Cases*, the preface and the publishing record of which leads one to think it is simply a reprint of the 1995 edition, a reference to the article we are discussing was added: A W Brian Simpson, *Leading Cases in the Common Law* (Oxford University Press, revised ed, 2001) 194 n 126. This chapter was cited in support of the argument in Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 38 n 76.

<sup>124</sup> (1865) 11 HL Cas 642; 11 ER 1483.

<sup>125</sup> *Ibid* 650; 1486 (Lord Westbury LC).

ly unsustainable and irrelevant to the basic issue anyway, but its significance is that it effectively condoned industrial pollution of a general sort. In the terms Simpson used in ‘The Story of *Sturges v Bridgman*’, *Tipping* is a landmark case in the erosion of protection from ‘less tangible interference’ that he thought it was the very function of the law of nuisance to provide.<sup>126</sup> Simpson unintentionally actually provided what we believe was formerly unknown evidence of this erosion when he told us that, after being forced to close, ‘the company moved its operations ... some three miles away, from where it could continue to pollute the [plaintiff’s] [e]state, albeit much less severely’.<sup>127</sup> Having shown that the plaintiff landowner, an extremely rich and eccentrically obstinate person, had been prepared to spend simply enormous effort and expense on winning the action he brought, Simpson does not explain this plaintiff’s acceptance of what he must have found just as intolerable an interference in his strict rights, were those rights strict.<sup>128</sup> The only explanation is that private nuisance rights are not strict but are inherently contingent in the way we have claimed.

The account of *Tipping* we have just given condenses that of Brenner as essentially affirmed by McLaren.<sup>129</sup> These works are cited in Simpson’s chapter on *Tipping* but not discussed in any detail.<sup>130</sup> He does, however, sum up McLaren’s work, in praise of which he is fulsome:<sup>131</sup>

J. P. S. McLaren, in a notable study, ... has shown how the common law of nuisance played a relatively unimportant part in controlling pollution, not primarily because of its doctrinal form, but because other social and institutional factors diminished its utility.<sup>132</sup>

By these factors Simpson means the transaction costs of legal action and the unequal distribution of the capacity to absorb those costs consequent upon inequality of wealth. These obviously are highly important, and in his article McLaren examined the relative significance of ‘what the courts said and did’

<sup>126</sup> Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 38.

<sup>127</sup> Simpson, *Leading Cases*, above n 94, 191.

<sup>128</sup> Ibid. Simpson also tells us that the plaintiff did not even try to obtain an injunction, which was the only remedy he would have thought adequate, against another somewhat more distant smelting works, but offers only what seems to be a very insufficient reason for this.

<sup>129</sup> Brenner, above n 94, 412–20; McLaren, above n 94, 156–8.

<sup>130</sup> Simpson, *Leading Cases*, above n 94, 172 n 35.

<sup>131</sup> In the first version of ‘The Story of *Sturges v Bridgman*’ he describes this article as a ‘classic’: Simpson, ‘Coase v Pigou Reexamined’, above n 1, 82.

<sup>132</sup> Simpson, *Leading Cases*, above n 94, 193.

and of 'institutional or social impediments to suit' as factors 'which hampered legal action to counteract industrial pollution'.<sup>133</sup> McLaren essentially concluded, contra Brenner, that the latter played a far greater role than the former in rendering the common law impotent in face of the polluting effects of the industrial revolution.

But, though it happens that we have a number of points of disagreement with McLaren, on the point of interest here, the substance of the legal doctrine, we have no disagreement. The analysis McLaren puts forward essentially is that of Brenner, with which McLaren himself did not disagree. McLaren summarises Brenner's analysis thus:

In essence, what the courts, and especially the House of Lords in [*Tipping*], did was to take the traditional maxim of *sic utere tuo ut alienum non laedas*, which prior to the nineteenth century had always worked in favour of hallowed residential and agricultural uses of land, and to re-define it, giving it a more relative quality which allowed for sympathetic discussion of the economic context and social utility of industrial activity.<sup>134</sup>

Of this analysis, McLaren says: 'As far as his analysis goes, there is no doubt that Brenner is correct'.<sup>135</sup> With respect, it is quite wrong, then, of Simpson to use McLaren's article as support for his argument about the substance of the law of nuisance as opposed to the social effect, or lack of social effect, of the common law. The views of Brenner on the substance of the law, not challenged by McLaren, contradict Simpson's argument.

It is, in truth, impossible to deny that use of the language of 'economics' is not uncommonly found in the judgments in the leading 19<sup>th</sup> century nuisance cases, including *Sturges v Bridgman* and *Tipping*, in much the jumbled way that Coase claimed. And, having, as we have seen, told us that 'the common

<sup>133</sup> McLaren, above n 94, 159.

<sup>134</sup> Ibid 157 (citations omitted). Simpson refers to McLaren three times in 'The Story of *Sturges v Bridgman*', on the first and third occasions in connection with points not in dispute here, but on the second to make a claim about McLaren's argument that we suspect involves the misinterpretation of McLaren: see Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 10 n 3, 12 n 13, 19 n 25. In Brenner, above n 94, 413–14 (emphasis altered), his conclusion about *Tipping* was that:

*St Helen's* made actions in respect of discomfort virtually impossible in the industrial Midlands and in [similar] regions such as Swansea and Cardiff. This is not to say that a successful action in respect of discomfort caused by an industrial nuisance was no longer conceivable in an industrial town, but the discomfort would have had to be direct, immediate, and obviously physical as in trespass. An eye put out by a cinder would have done, but not severe personal discomfort.

<sup>135</sup> McLaren, above n 94, 158.

law rejected the idea of permitting the economically efficient level of pollution', Simpson then said:

However the judges, and no doubt juries, in determining what is to count as an actionable nuisance, which is bound to involve questions of degree, have no doubt always accepted the idea that some level of mutual tolerance and adjustment between landowners is necessary if life is to go on, given the fact that the effects of land use are bound to cross territorial boundaries, and no doubt too a rough and ready economic calculus has been significant at the margins. To this weak extent the reciprocal nature of problems of conflicting land use has been accepted by the oracles of the law, and presumably by members of juries too. But in so far as economic considerations have been taken into consideration this does not mean that a rigorous system of analysis has replaced a less rigorous legal analysis; economic arguments, in so far as they feature in legal decisions, have been impressionistic only.<sup>136</sup>

If one acknowledges that all important cases are 'at the margins', which is why they are important, and that Coase made no claim whatsoever about the rigour of the courts' approach, quite the opposite in fact, this is, in our opinion, an effective agreement with Coase's position.

The lack of sympathy that nevertheless led Simpson to press his criticism of Coase so doggedly ultimately turned on their differing conceptions of property rights and the role of such rights in economic and legal reasoning, and to this we now turn.

### *C Solving Nuisance Cases by Means of Coasean Bargaining Would Be 'Offensive'*

#### 1 *Bargaining Outcomes and Imposition of Outcomes in Law and Economics*

Simpson was rightly of the belief that his criticism of Coase raised issues about the nature of the fundamental freedoms to be enjoyed in liberal democratic society. It will be recalled that he rejected the idea he attributed to Coase that the aim in nuisance cases should be to 'reach an economically efficient solution' because 'parties are not willing to place their rights in the market' and it would be 'offensive not to respect their unwillingness'.<sup>137</sup> The offensiveness arises from the value of the institution of private property, the core of which he believed to be captured in Blackstone's conceptualisation of

<sup>136</sup> Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 38.

<sup>137</sup> Ibid 33.

property as ‘that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe’.<sup>138</sup> Having quoted the relevant passage of *The Commentaries*,<sup>139</sup> Simpson said:

Despotic dominion is what the right of private property is all about, and it includes the right to behave in ways which make no contribution whatever to the national wealth. If I own a Renoir or a Picasso I may refuse every offer to purchase it and do so since I have decided to burn it. ...

[In nuisance cases] notions of economic or social value are wholly irrelevant. They must be in a capitalist system which respects the right of private property, for it is not the business of the courts to substitute their despotic dominion to that of the litigants. ...

It does not in the least follow that in particular cases property rights should be allocated to those who will produce the most wealth ... the law allows gifts to be made to the feckless and improvident, and testamentary dispositions too. Nincompoops may inherit, and contracts of sale are in no way affected by the fact that the purchaser is a shopaholic who has not the least use for the goods he purchases.<sup>140</sup>

The point is that, as Professors Korngold and Morriss, the editors who reprinted Simpson’s article, put it, ‘Professor Simpson questions the use of *efficiency* as a guiding star for decisions and instead supports the *freedom* of owners to do what they like with their property, free of ... social engineering by courts’.<sup>141</sup> This article is written because we are in complete agreement about the value that Korngold and Morriss placed on this freedom. But it is this very freedom that informs Coase’s views, and those views far better articulate what is involved in economically and legally institutionalising that freedom than do Simpson’s own.

<sup>138</sup> Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 3<sup>rd</sup> ed, 1765–69) vol 2, 2 (‘*The Commentaries*’).

<sup>139</sup> Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 34–5, quoting *ibid*.

<sup>140</sup> *Ibid* 35, 37, 39.

<sup>141</sup> Gerald Korngold and Andrew P Morriss, ‘Introduction’ in Gerald Korngold and Andrew P Morriss (eds), *Property Stories* (Foundation Press, 2004) 1, 3–4 (emphasis in original). Simpson discusses a very similar but in some respects superior argument in his chapter on *Tip-ping*, and there contrasts ‘economic analysis’ to an ‘ethical’ concern with the protection of property rights: Simpson, *Leading Cases*, above n 94, 175.

Simpson does not, in fact, believe in despotic dominion, for the very good reason that no one can possibly believe in it.<sup>142</sup> At the level at which we need to engage with the issue, the point may be simply made. Even if, to use Simpson's example, we allow that one's private property in a Picasso may enable one to burn it,<sup>143</sup> one cannot burn it by throwing it on a fire that a neighbour has started to dispose of rubbish on his or her land, or burn it on one's own land in such a way that would unreasonably interfere with the neighbour's enjoyment of his or her land. One could go on. Social life inevitably imposes limits on despotic dominion. Simpson is, of course, perfectly well aware of this, and he spoke of the law of nuisance as a law which 'intervenes when either party engages in activities which significantly abridge the freedom of their neighbor'.<sup>144</sup> But he did not recognise that the issue is not social coexistence as such but the way that the law of nuisance institutionalises freedom of ownership so that, far from being absolute or even strict, it has been contingent — broadly giving social engineering priority to economic growth over the *sic utere* rule. The very freedom that Simpson sought to protect is the freedom that it is of the nature of the positive law of private nuisance not to protect.

The fundamental theoretical point on which Simpson's argument turned was its failure to come to terms with the distinction between property rules and liability rules which may well be the most important conceptual innova-

<sup>142</sup> Blackstone did conceive of private property as an 'absolute' right, and opposed such rights to 'relative' rights which 'result from, and are posterior to, the formation of states and societies': *The Commentaries*, vol 1, 124. But, putting to one side the background understanding of natural and positive law which gives the distinction its full meaning, it is unsustainable as a distinction within the positive law of private property, and that law is always relative, even in Blackstone's own treatment of it. When first placing property on the list of absolute rights, he defines it as the 'free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land*': at 138 (emphasis added). Blackstone's treatment, whilst of the first importance in a legal sense of course, is not of great help in addressing the most profound theoretical issues: see generally Charles S Telly, 'The Classical Economic Model and the Nature of Property in the Eighteenth and Nineteenth Centuries' (1978) 13 *Tulsa Law Journal* 406.

<sup>143</sup> Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 35. We are grateful to Professor Robert Burrell for pointing out, however, that in many jurisdictions one's property right in a Picasso might not allow destruction of the painting. This is because, for at least as long as copyright continues to subsist (as it does in Picasso's works), the author's 'moral rights' would provide a right against destruction. This has long been true in civil law countries, but is also increasingly true in common law countries. For example, in the United States the author of a work of visual art shall have the right 'to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right': 17 USC § 106A(3)(B) (2011). See also *Copyright Act 1968* (Cth) ss 195AK, 195AQ(2).

<sup>144</sup> Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 37.

tion made within law and economics other than Coase's own contribution to the conceptualisation of the transaction cost.<sup>145</sup> Of the relevance of this distinction Simpson said:

Valuable though the distinction is, confusion can be caused here by contrasting entitlements protected by property rules from entitlements protected by liability rules, or property *rights* with liability *rules*. The statement of a property right is the statement of an entitlement which the law protects; in a sense it is a statement of an ideal. ... The enthusiasm or intensity of protection varies, so that in relation to personal property, much of which is fungible, orders for specific restitution are commonly not available. [With rights in land, specific recovery in cases of dispossession is available partly because it is more practicable, and partly because land is not treated as fungible.] To view this as a legal recognition that people can take other people's personal property so long as they pay for it seems to me to be profoundly mistaken. In the world we live in, which is partly structured by law, that is not the understanding. To do so will usually, but not always, constitute a criminal offence.<sup>146</sup>

Simpson's use of the word 'take' when he said that 'people can take other people's property so long as they pay for it' elides the basis of the distinction between property rules and liability rules in a most instructive way. The distinction is not between economic goods which can and cannot be bought but between two different ways of determining the value at which the sale takes place.<sup>147</sup> Goods legally institutionalised by property rules may be bought only at a value subjectively determined by their private owner. Goods legally institutionalised by liability rules may be bought at a value objectively

<sup>145</sup> Calabresi and Melamed, above n 13.

<sup>146</sup> Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 37 (emphasis in original); the sentence in square brackets has been moved and inserted to emphasise the contrast between various intensities of protection at which Simpson is driving.

<sup>147</sup> As we have just put it, this is in a sense misleading, but we will continue to speak in this way as the simplification involved is valuable and unobjectionable once one is clear one is making it. Simpson rightly said that goods are a bundle of legal rules, including property and liability rules: *ibid.* He does not seem to have fully appreciated the significance of the point that Calabresi and Melamed, above n 145, 1093, made the same point. Behind this lies the fact that, as all the institutions of modern society, including private property, rest on a constitutional framework provided by the state, ultimately there are no property rules. Nevertheless, it is submitted, the distinction between such rules and liability rules retains its value. As it was put by W Stanley Jevons, *The State in Relation to Labour* (Macmillan, 4<sup>th</sup> ed, 1910) 12: 'No laws, no customs, no rights of property are so sacred that they may not be made away with, if it can be clearly shown that they stand in the way of the greatest happiness. *Salus populi, suprema lex*'.

determined by the state.<sup>148</sup> A party therefore may buy a good institutionalised by a property rule only if he or she secures the voluntary agreement of the owner to the sale by offering what the owner believes is an acceptable price. That it is possible to take property by paying for it in this way is market exchange, though the word ‘take’ is inapt to describe a process based on voluntary agreement. On the other hand, it is possible to ‘buy’ a good institutionalised by a liability rule without the voluntary agreement of the owner by imposing what the state determines is the correct price. The obvious example is eminent domain, but regulated pricing of all types (including the regulation of terms which go to the adequacy of consideration) imposes a price on sales between private parties. The word ‘take’ is, to various degrees, apt to describe this process.

One who respects the sense of freedom involved in despotic dominion that Simpson endorses will find liability rules *prima facie* objectionable, but, of course, social engineering cases can be made out for them based on the public interest, and Simpson was, in fact, himself highly sympathetic to eminent domain.<sup>149</sup> In a celebrated lecture to the Selden Society on *Bradford v Pickles*,<sup>150</sup> Simpson strongly criticised the refusal of the law of England and Wales to develop a law of abuse of rights in order to curtail what Simpson saw (as it happens quite wrongly) as a private landowner’s attempt to exercise his despotic dominion over water percolating through his land, to the frustration of the Borough of Bradford which wished to tap the water.

Simpson’s strongly-expressed views in this lecture completely contradict the views expressed in ‘The Story of *Sturges v Bridgman*’ and in his chapter on *Tipping*, but we will put this to one side. However, if one starts with an idea that private property in land should involve ownership on the *sic utere* basis which most closely approximates to despotic dominion, what is completely unacceptable about the positive law of private nuisance is, not that it places a value on allowing interference, but that it institutionalises a liability rule under which the value of the interference is determined by the courts and

<sup>148</sup> Calabresi and Melamed, above n 13, 1092.

<sup>149</sup> A W B Simpson, *Victorian Law and the Industrial Spirit* (Selden Society, 1995) 16–17. In the course of his argument in this lecture, Simpson criticised the concept of ‘some ideal theoretical world’ in which ‘everyone behaves with economic rationality’: at 7. This lecture was the starting point for the definitive historical account of *Bradford v Pickles* [1895] AC 587 in an equally celebrated book published in the series of Oxford Studies in Modern Legal History under Simpson’s general editorship: Taggart, above n 57. See also: David Campbell, ‘Gathering the Water: Abuse of Rights after the Recognition of Government Failure’ (2010) 7 *The Journal Jurisprudence* 487.

<sup>150</sup> [1895] AC 587.



that value is often zero. If a nuisance is found but a perpetual prohibitory injunction is denied and compensatory damages awarded, the court determines the value of the interference. If interference is shown but it is found to be reasonable so that there is no nuisance, the court is allowing that interference at zero cost.<sup>151</sup>

If the law of nuisance were to approximate to the institutionalisation of a property rule, then nuisance would have to be based on strict liability for interference rather than the give and take principle, and the normal remedy would have to be a perpetual prohibitory injunction.<sup>152</sup> This would be to grant a chose in action to the owner of the affected land and a neighbour whose use would lead to interference would have to buy off the injunction at a price which the owner voluntarily agreed. This obviously would be something like the hypothetical situation Coase examined in Part III of 'The Problem of Social Cost'. If it was made similarly clear that no nuisance would be found (it is hard to conceive of the legal design of the necessary right), then this would be like the Part IV hypothetical situation. It certainly would be far more like these situations than the positive law of private nuisance.<sup>153</sup>

The problems with either of Coase's hypothetical situations are manifest.<sup>154</sup> Once it is realised that the injunction can be bought off, it is not that 'The Pricing System with Liability for Damage' would simply prevent industrialisation. It is that, *prima facie*, the transaction costs of negotiating the permissions to interfere necessary to, for example, allow industrial smoke pollution would be impossibly high. The result of liability for damage would, then, amount to much the same thing as simple prevention:

<sup>151</sup> For a review of the range of possibilities see Harris, Campbell and Halson, above n 92, 513–18. An interesting comment on United Kingdom law and practice has recently been provided by Professor Ben Pontin, who we have noted is a leading authority on the Victorian history of nuisance: Pontin, *Nuisance Law and Environmental Protection*, above n 94, ch 1.

<sup>152</sup> And so, as Epstein seminally argued, the law of remedies for nuisance (and in general) 'will never have a hard-edged and rigorous structure' whilst it is concerned with both 'justice' and 'utilitarian constraints' on justice: see Richard A Epstein, 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints' (1979) 8 *Journal of Legal Studies* 49, 98. See generally Richard A Epstein, 'A Theory of Strict Liability' (1973) 2 *Journal of Legal Studies* 151.

<sup>153</sup> The thought immediately strikes the tort lawyer that strict liability under 'the rule in *Rylands v Fletcher*' would, therefore, be the basis of a superior law: see *Rylands v Fletcher* (1868) LR 3 HL 330. But, without arguing it here, we believe that this rule has been so diluted that it is now as contingent as private nuisance. Simpson discussed *Rylands v Fletcher* in *Leading Cases*, above n 94, 195.

<sup>154</sup> Though Simpson is so insistent on despotic dominion that he simply denies the force of problems such as the hold-up problem: Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 34. We put this to one side.

Once the costs of carrying out market transactions are taken into account, it is clear that ... a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about. When it is less, the granting of an injunction (or the knowledge that it would be granted) or the liability to pay damages may result in an activity being discontinued (or may prevent its being started) which would be undertaken if market transactions were costless. In these conditions, the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates.<sup>155</sup>

It would be much the same in the situation of 'The Pricing System with No Liability for Damage', except, of course, that *prima facie* the transaction costs of negotiation would mean that limits could not normally be placed on general interference caused by industrial use. This is essentially what happened in Victorian Britain. But as the basis of the discussion in Parts III and IV of 'The Problem of Social Cost' is that transaction costs are assumed to be zero, it inevitably follows that the optimal level of interference is established, whether or not there initially is liability, as a logical consequence of this assumption.<sup>156</sup>

The point is that, far from assuming this assumption did apply, Coase thought it would never apply, and in Part VI turned his attention to the situation when 'The Cost of Market Transactions [is] Taken into Account'. We believe it is now possible to precisely identify the reason his argument in 'The Problem of Social Cost' encouraged confusion about that argument. To repeat: prior to Part VI, Coase had in Parts III and IV discussed the issues on the assumption of zero transaction costs, and in Part V he illustrated this by reference to actual cases such as *Sturges v Bridgman*. It must be said that his accounts of those cases are, as we have shown in respect of *Sturges v Bridgman*, profoundly misleading, and this was necessarily the case because the assumption of zero transaction costs cannot possibly apply to actual cases. Coase's way of illustrating his argument in Part V is exceedingly unfortunate.

In Part VII Coase engaged with these cases again after having, in Part VI, dropped the assumption of zero transaction costs. The consequence

<sup>155</sup> Coase, 'The Problem of Social Cost', above n 2, 115.

<sup>156</sup> Though Coase occasionally engaged with it in explication and defence of his general confidence in bargaining solutions, we put to one side the problem whether the hold-up problem can be conceived as a consequence of transaction costs or a property of economic action regardless of transaction costs.

of dropping this assumption is that the market may not yield the optimum outcome:

the assumption [of zero transaction costs] ... is, of course, a very unrealistic assumption. [The operations necessary] [i]n order to carry out a market transaction ... are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost. ... One arrangement of rights may bring about a greater value of production than any other. ... But ... the costs of reaching [this] result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production it would bring, may never be achieved.<sup>157</sup>

In Part VI this led Coase to consider the alternative governance structures of the firm and the government and, most importantly, to set up the principle of determining policy for the empirical world as 'one of choosing the appropriate social arrangement'.<sup>158</sup> Before turning to the significance of this, we must note that when in Part VII Coase again turned to actual cases, including *Sturges v Bridgman*, now assuming that transaction costs are positive, his argument was that the decisions in those cases show that 'the courts directly influence economic activity'<sup>159</sup> when they reach judgments aware, if 'not always ... very clearly',<sup>160</sup> of the reciprocal nature of the problem:

In a world in which there are costs of rearranging the rights established by the legal system, the courts, in cases relating to nuisance, are, in effect, making a decision on the economic problem and determining how resources are to be employed. ... [T]he courts are conscious of this and ... they often make ... a comparison between what would be gained and what would be lost by preventing actions which have harmful effects.<sup>161</sup>

Rather than facilitate the bargaining by which the parties determine the outcome, the courts are here themselves stipulating the outcome. This is an essentially accurate account of what does go on in nuisance cases. But this does not prevent the way Coase handled the point being extremely misleading in terms of the argument he sought to advance. Despite the apparent realism

<sup>157</sup> Coase, 'The Problem of Social Cost', above n 2, 114–15.

<sup>158</sup> Ibid 118. There also is, Coase says here, the 'further alternative, which is to do nothing about the problem at all'.

<sup>159</sup> Ibid 119.

<sup>160</sup> Ibid 123.

<sup>161</sup> Ibid 132–3.

of Part V, the bargaining Coase described in 'The Problem of Social Cost' is the bargaining at zero transaction cost that in Parts III and IV effectively sets up the Coase Theorem. Parts VI and VII then allowed positive transaction costs, and, most curiously, bargaining played no further part whatsoever in Coase's argument. When transaction costs are positive, Coase, in Part VI, considered the firm and government as alternative governance structures to common law decision-making, and then, in Part VII, considered decision-making by the courts rather than decision-making by the parties, the latter almost completely disappearing from his article. The presence of transaction costs, which of course prevents theoretical Pareto efficiency being achieved, led Coase to drop bargaining as a plausible governance structure altogether, with the consequence that, incredible to say in light of the history of the interpretation of the article, there is actually no examination of the empirical use of 'Coasean bargaining' in 'The Problem of Social Cost'.

This was not, of course, Coase's intention, and it is a particularly difficult point of interpretation because the article on 'The Federal Communications Commission' of which, as we have mentioned, 'The Problem of Social Cost' was intended to be a generalising restatement, is a paradigmatic policy argument for Coasean bargaining, proposing what would now be called a quasi-market in broadcasting frequencies then thought of their nature to be public goods. But in the restatement in 'The Problem of Social Cost', no positive proposals for bargaining when transaction costs are positive, or for the design of a legal framework for bargaining in these circumstances, are made. Having set out in Part VI the reasons why we must consider the firm and government as alternative forms of 'appropriate social arrangement'<sup>162</sup> to the market, Coase returned to the factory emission of smoke which he took as a 'standard example' of a harm at the start of Part I. In a very significant passage he almost immediately then said that it is 'particularly likely' that 'government administrative regulation' will 'lead to an improvement in economic efficiency' when, 'as is normally the case with the smoke nuisance, a large number of people is involved and ... therefore the costs of handling the problem through the market or the firm may be high'.<sup>163</sup> To the extent, then, that Coase puts forward any concrete policy proposal in 'The Problem of Social Cost', it is in fact one of government intervention.

<sup>162</sup> Ibid 118.

<sup>163</sup> Ibid.

The significance of this has escaped the many who, like Simpson, believe Coase was extremely biased against such intervention,<sup>164</sup> for surely it is an instance of what we believe is most valuable in Coase, his insistence on even-handedness when choosing the ‘appropriate social arrangement’.<sup>165</sup> Now it may well be the case that the factory smoke harm is unamenable to bargaining solutions, indeed it may be a paradigm case of a lack of such amenability. But it shows how little Coase was concerned in ‘The Problem of Social Cost’ (unlike in ‘The Federal Communications Commission’) to actually explore the real-world possibility of employing bargaining, that the smoke harm was the first example he mentioned in Part VI when, crucially, ‘The Cost of Market Transactions [is] Taken into Account’.<sup>166</sup>

## 2 *Coase and the Nature of Law and Economics*

The principal confusion to which ‘The Problem of Social Cost’ has given rise is, as we can now see, caused by the way when, putting aside his wholly inaccurate use of actual cases such as *Sturges v Bridgman* to illustrate the Coase Theorem, Coase describes what did happen in actual nuisance cases. This description is accurate, but it simply does not emerge that the description is not of bargaining solutions but of court imposition of solutions. Though it was a development at common law, this was, just as much as prescription by government and legislature, the stipulation of an outcome by the state. Simpson was entirely right to point to this as a serious anomaly,<sup>167</sup> and it is difficult to overstate the amount of confusion Coase’s argument has caused here.

Let us quote again the passage which we believe expresses the core of the attractiveness of the Coase Theorem, which is its application of market-

<sup>164</sup> Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 16. What Simpson precisely says is that ‘a deep skepticism as to the desirability of government intervention’ ‘runs through all Coase’s writings’. Now, in fact, this could be said to be true of all of Coase’s later writings, but Simpson does not mean ‘skepticism’, he means ‘bias against’.

<sup>165</sup> Coase, ‘The Problem of Social Cost’, above n 2, 118. See generally Campbell, ‘On What Is Valuable in Law and Economics’, above n 117, 496–505; Campbell and Klaes, ‘The Principle of Institutional Direction’, above n 121.

<sup>166</sup> Coase, ‘The Problem of Social Cost’, above n 2, 114. Even three decades later, when the wider ramifications of his transaction cost arguments had become much more apparent, he explained his analysis in ‘The Problem of Social Cost’ with explicit reference to the simplifying assumption of prohibitive levels of transaction costs that rule out bargaining solutions: Coase, ‘Notes on the Problem of Social Cost’, above n 19, 175.

<sup>167</sup> Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 21.

generated Pareto efficiency to situations previously thought to be outside the Pareto domain:

the immediate question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what. It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it will lead to an increase in the value of production.<sup>168</sup>

Though Coase argues for a bargaining solution to problems of ‘harm’, he rests his doing so on the claim ‘that it will lead to an increase in the value of production’. Now, Coase means by this that it is such an increase that will motivate the parties to bargain, and the mutual expectation of advantage is what does, indeed, motivate all bargaining. But, as James Buchanan observed, this is a misleadingly ‘objectivist’ way of putting Coase’s point.<sup>169</sup> It seems to envisage some overall increase in the value of production as a total social value which drives the process, when the entire point of private bargaining solutions, as opposed to planned solutions, is that the parties define the ‘increase in value’ entirely subjectively in terms of expectation of increase in their own advantage. A Pareto efficient outcome is possible only because these subjective expectations, coordinated by the invisible hand, express the autonomous choices of economic actors.

One might give little weight to this point as it relates to Coase’s advocacy of bargaining solutions. It may be said without creating confusion that, in a market setting, the Pareto efficient outcome will represent the overall value of production being maximised. But one must give the point enormous weight when one turns, as we have seen Coase turned in ‘The Problem of Social Cost’, away from bargaining solutions to actual decision-making by courts. For, ‘[i]n a world in which there are costs of rearranging the rights established by the legal system, the courts ... are, in effect, making a decision on the economic problem and determining how resources are to be employed’.<sup>170</sup> Courts taking this line are not establishing a framework within which economic actors will

<sup>168</sup> Coase, ‘The Problem of Social Cost’, above n 2, 114.

<sup>169</sup> James M Buchanan, ‘Cost, Choice and Catallaxy: An Evaluation of Two Related but Divergent Virginia Paradigms’ in Francesco Parisi and Charles K Rowley (eds), *The Origins of Law and Economics: Essays by the Founding Fathers* (Edward Elgar, 2005) 156, 158 (emphasis altered). On Posner’s adoption of the ‘maximum value’ principle, see James M Buchanan, ‘Good Economics — Bad Law’, Book Review: *Economic Analysis of Law* by Richard A Posner (1974) 60 *Virginia Law Review* 483.

<sup>170</sup> Coase, ‘The Problem of Social Cost’, above n 2, 132–3.

reach solutions by bargaining; they are prescribing the solutions. This, we take it, is what Coase means by ‘directly’ when he describes instances in which ‘the courts directly influence economic activity’.<sup>171</sup> They of course do so in the belief ‘that they [are] affecting the working of the economic system — and in a desirable direction’,<sup>172</sup> and any such belief must involve, however inarticulately, a claim to know how to increase the social value of production in the misleadingly objectivist way criticised by Buchanan, and a further claim to be able to make decisions which realise that value. By immediately abandoning bargaining solutions when transaction costs are positive and moving to the sort of decision-making he describes in the positive law of private nuisance, Coase moved in a most confusing way from the courts establishing a negotiating framework for private parties’ solutions to the courts as an agency of the state imposition of solutions.

It is not going too far to say that this confusion in Coase has been the very basis of the Posnerian approach that has dominated the development of law and economics since ‘The Problem of Social Cost’.<sup>173</sup> Posner himself typically confines bargaining solutions to general equilibrium situations in which bargaining would yield Pareto efficient outcomes, for he thinks that the presence of transaction costs prevents theoretical Pareto efficiency, as it indeed does, but also that this makes bargaining solutions of little relevance to real world situations. His characteristic position actually is that ‘[a]s is well known, the Pareto solution is apparent rather than real’,<sup>174</sup> because it requires conditions that ‘can only rarely be fulfilled’,<sup>175</sup> and so we are faced with a general problem of ‘the unavailability of a practical method for eliciting express consent’.<sup>176</sup> The core of Posnerian law and economics is the identification of principles of economic efficiency, notably welfare maximisation, which

<sup>171</sup> Ibid 119.

<sup>172</sup> Ibid 107.

<sup>173</sup> The argument of the next two paragraphs condenses that made at proper length and with full referencing in David Campbell, ‘Welfare Economics for Capitalists: The Economic Consequences of Judge Posner’ (2012) 33 *Cardozo Law Review* 2233. Appreciation of the welfare economic basis of Posner’s treatment of reasoning in court makes his, on the face of it bewildering, recent apparent volte-face to advocacy of Keynes and Pigou perfectly easy to understand: David Campbell, ‘The End of Posnerian Law and Economics’ Book Review: *A Failure of Capitalism: The Crisis of ’08 and the Descent into Depression* by Richard A Posner (2010) 73 *Modern Law Review* 305.

<sup>174</sup> Richard A Posner, *The Economics of Justice* (Harvard University Press, 1981) 88, citing Guido Calabresi and Philip Bobbitt, *Tragic Choices* (W W Norton, 1978) 83–5.

<sup>175</sup> Ibid 55.

<sup>176</sup> Ibid 96.

can guide courts which therefore have to stipulate outcomes — as Pareto efficiency realised through bargaining has little application: ‘the Pareto-superiority criterion is inapplicable to most policy questions’<sup>177</sup> as it is very often unable to endorse a ‘move [which] must increase the wealth of society’.<sup>178</sup> As Posner came to realise, this argument is not different in principle from Kaldor–Hicks efficiency, except that the goals of the policy are typically not the ‘left-wing’ ones normally associated with welfare economics but the ‘right-wing’ ones of Posnerian law and economics. Posner has even gone so far to identify Kaldor–Hicks and welfare maximisation in *Economic Analysis of Law*: ‘the ... concept of efficiency mainly used in this book [is] called the Kaldor–Hicks concept of efficiency, or wealth maximization’.<sup>179</sup>

The question which obviously arises is whether the courts are in any better position to reach objective assessments of overall social welfare (and how to actualise it) than other state bodies, in particular the legislatures often castigated in Posnerian law and economics.<sup>180</sup> We do not want to enter into a discussion of this question. It has been our aim merely to show that, following the confusion caused by Coase’s own quick abandonment of bargaining solutions in ‘The Problem of Social Cost’, Posnerian law and economics have themselves overwhelmingly not been concerned with bargaining solutions but with objective, state-imposed solutions when the Pareto domain is thought to be small to the point of non-existence. As it has principally been developed, law and economics completely reverses what Coase intended to do in ‘The Problem of Social Cost’. Law and economics of this sort does capture the nature of the positive law of private nuisance,<sup>181</sup> but those law and economics, like that law, are not based on bargaining but on alternatives to bargaining. Is

<sup>177</sup> Ibid 89.

<sup>178</sup> Ibid 91.

<sup>179</sup> Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer, 9<sup>th</sup> ed, 2014) 14.

<sup>180</sup> Ibid 729: ‘Judge-made rules are more likely to be efficiency-promoting than those made by legislatures, other than those legislature-made rules that codify common law principles’. The point was more fully stated in previous editions: Richard A Posner, *Economic Analysis of Law* (Aspen Publishers, 8<sup>th</sup> ed, 2011) §19.2, 713–14: ‘Although the correlation is far from perfect, judge-made rules tend to be efficiency-promoting whilst those made by legislatures, other than those rules that codify common law principles ... tend to be efficiency-reducing’. As this distinction has been developed by Posner, the common law has predominantly come to mean court stipulation of outcomes in conformity with wealth maximising rules. This is at complete variance with the distinction between ‘common law’ and ‘legislation’ predominantly drawn in liberal thought in which the former is conceived, not as the stipulation of outcomes, but as the setting of frameworks for decision-making by the parties themselves.

<sup>181</sup> Posner, *Economic Analysis of Law*, above n 179, 62–5.



there any possibility of a reformed law of nuisance that would give greater scope to bargaining solutions?

### 3 *Nuisance as a Bargaining Solution*

For what it is worth, it is our belief that, in the 19<sup>th</sup> century circumstances — broadly the unprecedented possibilities of improvement brought about by industrialisation; pronounced inequality of wealth, an important part of which was overwhelmingly unequal distribution of the capacity to bring legal action; and, most importantly, the vestigial regulatory capacity of the state — nuisance had to be developed on a give and take basis, even though it therefore was made essentially irrelevant to the determination of the optimal level of pollution, or rather was the basis of a general, largely un-costed permission to pollute. But in light of the subsequent growth of very far-reaching systems of public planning permission and control,<sup>182</sup> private nuisance should now be placed on a *sic utere* basis. By strengthening despotic dominion, this reform would provide those with the requisite interest in property with far greater power to oppose, or charge for, interference than they now normally enjoy, and the public planning system would always offer a possible check on the exercise of that power.<sup>183</sup> And, indeed, a growing consciousness of government failure in respect of the regulation of pollution has led to the exploration

<sup>182</sup> After discussing nuisance at common law, in Coase, 'The Problem of Social Cost', above n 2, 119–26, Coase turned to the 19<sup>th</sup> century growth of statutory control of interference in Part VII: at 126–32, and returned to the theme in Part VIII as part of his explicit criticism of Pigou: at 135–42. He there raises the now very famous railway sparks example, his treatment of which is, choosing our words carefully, simply dismissed in Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 27 (the treatment is longer in Simpson, *Leading Cases*, above n 94, 168–9). Coase's own response to this criticism was largely unavailing: Coase, 'Reply to Simpson', above n 4, 111–13, and Simpson's further contribution is highly critical of what Coase said: Simpson, 'An Addendum', above n 5, 100–1. Nevertheless, Coase was, in our opinion, essentially right about the railway sparks example. It is all very similar to the position over private nuisance which we are examining here, and a full discussion would require a treatment at similar length to that discussion. The core of such a treatment may be found in: P S Atiyah, 'Liability for Railway Nuisance in the English Common Law: A Historical Footnote' (1980) 23 *Journal of Law and Economics* 191; Allen M Linden, 'Strict Liability, Nuisance and Legislative Authorization' (1966) 4 *Osgoode Hall Law Journal* 196. The particular value, as it were, added to Brenner's and McLaren's histories of nuisance by Morag-Levine, above n 94, 56–62, is its more extensive discussion of the growth of the statutory regime in parallel with the common law regime, which was significantly different in the United Kingdom and the United States.

<sup>183</sup> Harris, Campbell and Halson, above n 92, ch 25.

of the value of nuisance as ‘the environmental tort’.<sup>184</sup> The expansion of the use of nuisance in this way could have a very positive effect on the ability of the private citizen to directly participate in the determination of the level of interference and thereby on the relationship of the private and public systems of regulation of pollution and other competing uses. We do not pretend to have done more than mount a *prima facie* case for this immense reform; perhaps not even that.<sup>185</sup> We put it forward to indicate what we believe is latent in Coase’s own argument in ‘The Problem of Social Cost’ in order to clarify that argument.

The irony of Simpson’s article is that the benefit of reading it strongly reinforces our belief that Coase missed a trick by not actually going into the possibilities of Coasean bargaining in ‘The Problem of Social Cost’. Simpson seizes on the fact that ‘no deal was done’ between Mr Bridgman and Dr Sturges in order to ridicule the possibility that devising ‘mechanisms for reducing ... transaction costs’, or ‘leaving the outcome to the market is likely to be the best solution’:

the resolution of the dispute ... was indeed left to the market, in the sense that there was no legal impediment to their reaching an agreement which would have been binding upon them in private law. But though left to the market in this sense, no deal was done.<sup>186</sup>

But, bringing to light previously unknown material from the background of *Sturges v Bridgman*, Simpson showed, in a way that certainly was no part of his intention, that Coasean bargaining actually did take place in the case, even if not in the reported litigation. It was for this reason that Simpson said that ‘[t]he case certainly illustrates the reciprocal nature of the problem of social cost’:

<sup>184</sup> Campbell, ‘Of Coase and Corn’, above n 93 discusses this literature in the context of proposing a nuisance scheme for the introduction of genetically modified crops into the United Kingdom.

<sup>185</sup> Amongst the number of much more substantial explorations of this possibility, one has particular relevance to the theoretical issues considered here. Prior to his early contribution to the legal strand of the reinterpretation of the Coase Theorem begun by Schlag (Robert C Ellickson, ‘The Case for Coase and Against “Coaseanism”’ (1989) 99 *Yale Law Journal* 611), and to the research which led to his outstanding reflections on the rancher and farmer example (Robert C Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard University Press, 1991)), Professor Ellickson had undertaken work in this vein: Robert C Ellickson, ‘Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls’ (1973) 40 *University of Chicago Law Review* 681.

<sup>186</sup> Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 19.

In fact Dr Sturges did try negotiation, first complaining personally and then, in the spring of 1876, through his solicitor. The precise form of these negotiations is unrecorded, but from what Mr Bridgman said in reply we may guess that there was some suggestion that he might arrange to use his mortars at times when the consulting room was not in use. ...

In his affidavit Mr Bridgman, as if he had read Coase, indeed made the point that the problem was a reciprocal one, and he took the line that it was all the fault of Dr Sturges [by building the consulting room when he, Mr Bridgman, had operated his machinery for many years previously.] ... In response to Dr Sturges' complaint he had done what he could to confine the use of the mortars to times which did not trouble the doctor. ... He could do no more if he was to run his business. So it was that little was achieved in the negotiations, and the dispute came to litigation ... Negotiation will normally precede litigation in nuisance cases of this kind. The story which emerges from the affidavits is a very everyday account of a dispute between neighbours, here both engaged in commercial activity, with an attempt to work out things amicably.<sup>187</sup>

Now, a lawyer today, and no doubt just as much then, would expect precisely this to happen, but Coase could not have been expected to uncover this material, which has been brought to light only by the efforts of one of the greatest of modern legal historians. However, if he had had that material to hand, rather than misleadingly using *Sturges v Bridgman* effectively to claim that successful bargaining took place when it didn't, Coase could have attempted to explain why the bargaining that actually did take place did not succeed, which would have involved a criticism of the shortcomings of the positive law, and of the extent to which it did pose a 'legal impediment to their reaching an agreement'.<sup>188</sup> By claiming too much for bargaining, he did not at all examine the extent of what might justifiably be claimed for it.<sup>189</sup>

One has to ask what has happened to the 'offensive' use of bargaining to resolve problems of competing use? In the end, Simpson's criticism of Coase turns on a rejection of 'economic rationality', and this rejection ultimately is

<sup>187</sup> Ibid 29–31.

<sup>188</sup> Cf ibid 19.

<sup>189</sup> Ellickson, of course, got this right: Robert C Ellickson, 'Of Coase and Cattle: Dispute Resolution Among Neighbours in Shasta County' (1986) 38 *Stanford Law Review* 623, 686:

Although [my] findings are at odds with the literal features of the Coasean parable, they are fully consistent with Coase's central idea that, regardless of the specific content of the law, people tend to structure their affairs to their mutual advantage.

not focused on ‘rationality’<sup>190</sup> but on ‘economic’.<sup>191</sup> Simpson rejected the very idea that a market transaction should play a role in resolving disputes over competing uses. We have already quoted Simpson’s argument that ‘[t]he reason why a market transaction in the sense of a purchase and sale of rights is ... not possible in ... situations [like *Sturges v Bridgman*] is that the parties are not willing to place their rights on the market’.<sup>192</sup> This is an example of a general quality of social life:

Life would be quite intolerable if individuals did not in general respect social limits to the market ... Engaging in market transactions is just one form of human activity, and without such boundaries life would dissolve into unstructured chaos, in which it would be impossible to distinguish going shopping, from going out to dinner, or from going mountain climbing, or from going fishing with a friend. In the situation which confronted the doctor and the confectioner an offer of money by Dr Sturges to help over [sic] any costs involved in moving or insulating the mortars might well have been socially acceptable, and would not, except to a certain type of economist anxious to assimilate all human action to market transactions, be thought of as a sale but rather as a contribution to the cost of action from which he would be the principal beneficiary and from which he otherwise would be unjustly enriched. Anything more than such an offer would surely have bordered on the offensive.<sup>193</sup>

As it happens, Simpson unknowingly scored a hit here as, in the limited comments he made on the nature of economic action, Coase did seem to commit himself to Becker’s extreme economic imperialism,<sup>194</sup> from which

<sup>190</sup> Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 20, 40, attributed a commitment to hyper-rationalist cost-benefit analysis to Coase which Coase certainly did not have, and Simpson’s criticism of which, quite against his intention, would be more applicable to Pigou, though we cannot go into this here.

<sup>191</sup> It was his blanket aversion to what he understood to be the ‘economic’ motivation of action that allowed Simpson both to defend an un-nuanced idea of despotic dominion in ‘The Story of *Sturges v Bridgman*’ and to reject it *tout court* in his lecture on *Bradford v Pickles*: Simpson, *Victorian Law and the Industrial Spirit*, above n 149, 16–17. In relation to Coase’s own early contribution to what is now known as ‘economic behaviourism’ see Matthias Klaes, ‘Transaction Costs and Behavioural Economics’ in Morris Altman (ed), *Real-World Decision Making: An Encyclopedia of Behavioral Economics* (Greenwood, 2015) 440.

<sup>192</sup> Simpson, ‘The Story of *Sturges v Bridgman*’, above n 1, 32.

<sup>193</sup> *Ibid* 33.

<sup>194</sup> Coase, ‘The Firm, the Market and the Law’, above n 79, 2–5. Cf Campbell, ‘On What Is Valuable in Law and Economics’, above n 117, 496–507.

even Becker himself has now retreated.<sup>195</sup> But does he score a hit on anything in Coase's argument in 'The Problem of Social Cost'? He undoubtedly is right that as a matter of legal history neither Dr Sturges and Mr Bridgman nor those who heard their case looked on the issues in clear, economic terms. His speculation about what they did think is highly plausible:

No doubt Mr Bridgman thought he had a perfect right to go on using his mortars as he and his father had done in the past, and you do not pay people money for a right you believe you already possess. ... And no doubt Dr Sturges ... thought he had a right to peace and quiet in his home, so that he could see his patients ... and again you do not offer to pay people money for what is yours already. ... In short I doubt if either of the two men questioned for one moment the right of the other to continue to pursue their business on their property.<sup>196</sup>

But to the extent this was the parties' thinking, then their thinking was nonsense. Such thinking would indeed leave them with a clash of what they believed to be absolute, unqualified rights to use, but as those uses were opposed, they could not possibly both have the right to their use. How was the clash of absolutes resolved, if this is the right word? That the parties themselves entered into negotiations prior to the eventual litigation showed that their thinking also involved some unclear perception of the reciprocal nature of the problem. That when these negotiations failed and the parties entered upon litigation, the Courts which heard the matter thought it uncontroversial that Dr Sturges could move to the nuisance is completely inexplicable unless they also had some such perception; and Simpson does, in fact, admit this. Of course, this perception was very unclear, but Coase never claimed more than this. Though we hope we have made it clear how far Simpson is correct about the legal history, Coase is correct at a far more fundamental level. He does not rest at the level of the parties' self-understanding but shows the limits of that understanding. He also shows the limits of the positive law, and offers us the possibility of rethinking that law so as to make it capable of dealing far more adequately with problems of competing uses.

If we are to utilise Coase's insight, we have to accept the hard facts on which it is based. The problem is a reciprocal one. Giving up a polluting use does have costs. Determination of the best possible policy does require us to respect 'economic' considerations. Brian Simpson was of a generation the instinct of which was to regard self-consciousness of resource constraint as an

<sup>195</sup> See Gary S Becker and Kevin M Murphy, *Social Economics: Market Behaviour in the Social Environment* (Belknap Press, 2000).

<sup>196</sup> Simpson, 'The Story of *Sturges v Bridgman*', above n 1, 32.

unworthy concession to 'the market'. A moment's reflection on influential political movements which would set us the goal of preventing pollution, or do not think the natural environment is a fit subject for economic policy, show that this attitude remains influential.

## VII CONCLUSION

We have tried to show where Coase's argument in 'The Problem of Social Cost' is deficient, not in its substance, for we have not taken up the points where we do think that argument is deficient in substance, but in its presentation of what we believe is substantially correct and, indeed, of seminal importance: the demonstration of, first, the reciprocal nature of the problem of competing uses and, secondly, that the legal framework within which that problem is handled is of the first importance in determining the optimality, or otherwise, of the result. The deficiencies in Coase's argument that we have identified turn on Coase's first use of actual cases such as *Sturges v Bridgman* in Part V of 'The Problem of Social Cost' being a very misleading illustration of the purely theoretical argument which we now know as the Coase Theorem. Coase's overall aim was to show that arguments about what would happen at zero transaction costs were irrelevant to determining policy and to argue that economists should stop making such arguments. Recourse to seemingly realistic illustrations drawn from actual cases was bound to cause confusion. But this is in fact of less importance than that, when he returned to those actual cases in Part VII, having abandoned the assumption of zero transaction costs, he did not explore the possibilities of what we would now call Coasean bargaining when transaction costs were positive. Instead he considered alternatives to such bargaining: the firm, government and cases decided by courts which stipulate outcomes. But courts making decisions in this way are not providing a framework for the parties to make decisions; they are intervening just as much as a government pursuing prescriptive statutory regulation. There is, in the end, too much state and not nearly enough voluntary exchange in 'The Problem of Social Cost', and in the predominant, Posnerian, strain of law and economics.

The influence of the Coase Theorem on the reception of 'The Problem of Social Cost' shows that article to have been, in one sense, undeniably a failure. It is essential to acknowledge the shortcomings of Coase's presentation of his argument in order to grasp the enormous underlying strength of that argument. Simpson's criticism of Coase is perfectly correct in regard of the legal history of *Sturges v Bridgman*, but as regards the theory of law and economics, this criticism is in all important respects mistaken. That the Coase Theorem is

purely a theoretical device is something which it can be said it was, for reasons Simpson did not understand, Coase's main aim to argue. The law of private nuisance does not provide a framework for Coasean bargaining, but this is because it is not a system of unqualified property rights but a liability rule generally qualifying those rights in the claimed public interest. Coase, to be sure, was himself confused on all these points, and this confusion coloured the argument of 'The Problem of Social Cost' and so the reception of that argument. Nevertheless, Coase's position on the theoretical issues which emerge from his discussion of *Sturges v Bridgman* stands as the most profound insight into the nature of those issues in, not merely law and economics, but post-war economics or law *tout court*.